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In The

Supreme Court of the United States

October Term, 1996

CHANDRELLE L. WHITE-PAGE, Individually and as Next Friend of the Minor Children of GLEN PAGE, GLEN PAGE, JR. and MARQUS MIGUEL GLENZELL PAGE, and PERCY PAGE, Individually and as Representative of Estate of GLEN PAGE, Deceased, and LAVERNE CHERRY, Individually and as Representative of the Estate of GLEN PAGE, Deceased,

Petitioners,

vs.

HARRIS COUNTY, TEXAS and THE HARRIS COUNTY ORGANIZED CRIME AND NARCOTICS TASK FORCE,

Respondents.

On Petition for Writ of Certioruri to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

G.P. HARDY III
HARDY & JOHNS
Two Houston Center
909 Fannin, Suite 500
Houston, Texas 77010
(713) 222-0381

DAVID A. FURLOW
MORRIS & CAMPBELL, P.C.
600 Jefferson, Suite 1617
Houston, Texas 77002
(713) 659-8697

KENNETH A. ZIMMERN
Counsel of Record
Two Houston Center
909 Fannin, Suite 1101
Houston, Texas 77010
(713) 751-3131

Attorneys for Petitioners

71487 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Whether an appellate court can properly apply the harmless error rule to affirm a district court's *sua sponte* ruling depriving a non-movant of notice of a summary judgment issue not specified by the movant, without violating the Fourteenth Amendment's guarantee of due process and Rule 56(c), Fed. R. Civ. P.?

2. Whether a multi-jurisdictional, anti-drug task force among federal, state, county and city law enforcement agencies can be held accountable, under the law, to the surviving family members of the confidential informants it uses as front-line troops in the war against drugs?

3. Whether the State has a constitutional duty under the Due Process Clause of the Fourteenth Amendment to protect citizens from violence from third parties, when the State puts that citizen in danger by placing the citizen in harm's way and depriving that citizen of sources of private aid?

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The survivors of a deceased confidential informant petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit entered a judgment on May 1, 1997 that is not reported. (Pet. App. A.) The order and final judgment of the United States District Court for the Southern District of Texas, Houston Division was entered on July 2, 1996; it has not been published. (Pet. App. B.) The Magistrate's Order of Clarification was entered on February 7, 1996. (Pet. App. C.) The Magistrate's Memorandum and Recommendation was entered on October 20, 1995. (Pet. App. D.)

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Fed. R. Civ. P. Rule 56(c) provides, in pertinent part, that,

> [t]he motion shall be served at least 10 days before the time fixed for the hearing.

STATEMENT OF THE CASE

This petition involves two issues: (1) whether the Fifth Circuit application of the "harmless error" doctrine violated the

standards of appellate review that protect the Fourteenth Amendment's guarantee of due process, as this Court articulated them in *Atchinson, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987); and (2) whether a multi-jurisdictional task force of federal, state, county and city anti-drug law enforcement agencies is legally unaccountable to the parents, spouse, and children of one of its confidential informants ("C.I.") for causing a drug dealer's murder of a C.I. assisting in a "buy-bust" sting operation.

A. Course of Proceedings and Disposition in the District Court.

The case arose when the wife, two children and parents of a C.I., Glen Page ("Page") filed suit against Harris County, Texas ("Harris County") and the Harris County Organized Crime and Narcotics Task Force ("Task Force") (collectively, "Respondents") for money damages, alleging violations of Page's constitutional rights under 42 U.S.C. § 1983. The suit alleges that Page died as a result of his involvement with a Harris County/Task Force sting operation, namely, from the Respondents' deliberate indifference to Page's safety, failure to disclose certain risks, and failure to protect him while conducting the raid that resulted in his death. (R., vol. 4, pp. 8, 187-186, ¶¶ 10-13; vol. 2, p. 550.) Page is survived by his two minor children, wife, father and mother, the Plaintiffs in the District Court below. (R., vol. 4, p. 11, ¶ 7.)

Petitioners sued in the United States District Court for the Southern District, Houston Division. (R., vol. 4, pp. 10-12.) On April 28, 1995, Harris County filed a motion for summary judgment. (R., vol. 4, p. 136, *et seq.*) The District Court *sua sponte* referred the case to a Magistrate. (R., vol. 4, p. 193.) Petitioners obtained leave to file a Third Amended Original Complaint (the "Complaint") on July 19, 1995. (R., vol. 2, p. 553.) The Complaint added a new claim for breach of oral and written contract against Harris County and the Task Force,

alleging that they failed to pay Page's survivors money owed as a result of Page's services in securing the criminal convictions of various drug dealers, including the dealer who murdered him. (*Id.*)

On October 20, 1995, the Magistrate entered her Memorandum and Recommendation that the District Court grant Harris County's motion for summary judgment. (Pet. App. D at 27a.) Petitioners objected. (R., vol. 1, p. 855.) On February 7, 1996, the Magistrate entered an order of clarification. (Pet. App. C.) Petitioners objected, and requested the District Court's *de novo* review. (R., vol. 1, p. 881.) On March 14, 1996, the District Court overruled Petitioners' objections and adopted the Magistrate's clarified recommendation. (R., vol. 1, p. 882.) Petitioners filed a motion for reconsideration. (R., vol. 1, p. 895.) The District Court denied it; in a final judgment of June 28, 1996, it disposed of all Petitioners' claims against Harris County and the Task Force. (Pet. App. B.)

The final judgment suggests that the District Court operated under the misunderstanding that the Magistrate recommended *dismissal* of Petitioners' claims against Harris County under the Texas Tort Claims Act, 42 U.S.C. § 1983, and for breach of contract, for *failure to state causes of action*. (Pet. App. B at 9a.) The District Court also dismissed Petitioners' claims against the Task Force, predicating this dismissal on the Magistrate's original recommendation. The District Court never reached the merits of the Task Force's Fed. R. Civ. P. 12(b)5 motion. (Pet. App. B at 9a, n.3.)

Without oral argument, the United States Court of Appeals handed down a *per curiam* opinion on May 1, 1997, affirming the lower court's summary judgment. (Pet. App. A at 7a.)

B. Statement of Facts.

1. The parties. On January 11, 1993 a drug-dealer murdered Page while eighteen year old Page was serving as a

C.I. for Harris County and the Task Force. Page was new to the job, having just learned about the Task Force's enforcement of drug laws while watching "City Under Siege" on television, where Task Force representatives solicited help from the public and listed the Task Force's telephone number. (R., vol. 3, pp. 514 and 482.)

Harris County is a governmental unit. (R., vol. 4, p. 11, ¶ 4.) The Task Force is an multi-jurisdictional, multi-agency, inter-governmental law enforcement entity that utilizes officers and resources of the Harris County District Attorney's Office, the Harris County Sheriff's Office, police departments of several cities, the Texas Department of Public Safety, the FBI, and the United States Drug Enforcement Agency ("DEA"). (R., vol. 2, p. 753, ¶ 3.) Among other things, it pays C.I.s for their law enforcement services. (R., vol. 4, p. 128.)

2. *Harris County and the Task Force recruited Page to help them conduct buy-bust sting operations.* Linda Smith, a Deputy with the Harris County Sheriff's Department ("Sheriff"), recruited Page as a C.I. From December 9, 1992 until his January 11, 1993 death, she repeatedly employed Page as one of the Task Force's C.I.'s, paying him $3,000 in Task Force funds for his information and services in six narcotics cases. (R., vol. 4, p. 135, ¶ 2 and p. 130; R., vol. 3, pp. 475-480.) She made those payments pursuant to a written "Cooperating Individual Agreement" (the "C.I. contract") that Page, Deputy Smith and Captain Reff of the Task Force signed prior to December 10, 1992 (Page was not eligible for payment until he signed). (R., vol. 3, pp. 452-451.)

While acting as a C.I., Page introduced Deputy Smith (under cover) to drug dealers. (R., vol. 3, pp. 474 and 473.) After meeting the dealers, Deputy Smith would buy illegal narcotics. (*Id.*) Soon after each "buy," the Task Force "busted" the dealers. (*Id.*; R., vol. 3, p. 479.)

3. Harris County and the Task Force planned the January 11, 1993 buy-bust. On January 11, 1993, Harris County Sheriff's Deputies assigned to the Task Force, accompanied by a DEA agent, were investigating cocaine trafficking inside Harris County. (R., vol. 4, p. 130 and vol. 3, p. 468.) Following Deputy Smith's instructions, Page telephoned Mr. DePriest Earl Moses, a man suspected of being a drug dealer, and tentatively arranged to purchase nine ounces of cocaine.

4. Plans changed: the location for the buy-bust moved from a public place to a fortified apartment. The first direct meeting with the suspect DePriest Earl Moses (R., vol. 4, p. 130) was scheduled at a hamburger stand. (R., vol. 3, p. 468 and vol. 3, p. 435, ll. 4-8.) The suspect changed the location, telling Page that he would "do the deal" at his apartment. (R., vol. 3, p. 467; R., vol. 3, p. 434, ll. 7-12.) Deputy Smith then spoke to the suspect, and allegedly specified that it would occur in a parking lot. (R., vol. 3, p. 467, ll. 13-17.)

Upon arriving at the suspect's apartment, Deputy Smith informed the arrest team that she could observe burglar bars on the windows and door of the apartment where the suspect lived. (R., vol. 3, p. 347, l. 8 – p. 38, l. 7.)

5. Harris County and the Task Force sent Page into the drug-dealer's crack den. Deputy Smith sent C.I. Page into the suspect's apartment. (R., vol. 3, p. 410, ll. 7-17.) When Page returned to the undercover vehicle, he informed Deputy Smith that, "the dope is on the table, but they want to do the deal inside the apartment." (R., vol. 3, p. 430, l. 24 – p. 429, l. 6; p. 428, l. 4-8; R., vol. 3, p. 466, ll. 3-10.)

Deputy Smith escorted Page back to the apartment a second time, so he could confer with the suspect. Sergeant Kessler ordered Deputy Smith to instruct Page to relay a message to the cocaine dealer. (R., vol. 3, p. 417.)

From his apartment door, the suspect stated that "only one can come in." (R., vol. 3, p. 466, l. 20.) Page went inside the apartment. (R., vol. 3, p. 466, ll. 20-21.) Deputy Smith returned to the safety of her vehicle. (*Id.*, vol. 3, pp. 466, ll. 22-24 and 461, l. ll.) After Page had been inside the apartment for five to eight minutes (R., vol. 3, p. 466, l. 25), out of touch and out of sight, Sergeant Kesseler ordered the team to raid the apartment. (R., vol. 3, pp. 466, ll. 15 – p. 465, l. 3.)

6. The drug dealer shoots Page. The suspect spotted the officers, slammed the front door shut, and then shot three times (R., vol. 3, p. 465, ll. 3-9) with a .45 caliber revolver. (R., vol. 4, p. 102 [Autopsy Report].) Page suffered multiple bullet wounds (R., vol. 3, p. 105) that subsequently caused Page's death. (R., vol. 4, p. 107 [Autopsy Report]; R., vol. 3, p. 465, p. 51, ll. 6-9; vol. 3, p. 355, ll. 1-12.)

7. Page helped secure the drug dealer's surrender and arrest. After Harris County/Task Force officers heard shots, they stormed the suspect's apartment. Because the burglar bars over the front door were locked, they could not gain entry. (R., vol. 3, p. 355, l. 13 – p. 354, l. 2.) Page managed to assist the Harris County/Task Force officers by unlocking the wooden front door. (R., vol. 3, p. 412, ll. 19-25.) The officers then used a burglar bar key to gain entry. (R., vol. 3, p. 411, ll. 1-9.)

8. Page's mortal wounds, death, and survivors's losses. Page later died at Ben Taub Hospital of a .45 caliber gunshot wound. (R., vol. 4, pp. 107-04.) Members of Page's families are the Plaintiffs in this case. (R., vol. 4, pp. 10-12; vol. 2, pp. 551-553.) Neither Harris County nor the Task Force made any effort to pay Page's widow, children or parents the C.I.'s fees and compensation he earned before sacrificing his life in the war against drugs. (R., vol. 1, pp. 847-48, ¶ 24; R., vol. 3, pp. 439, l. 17 to p. 438, l. 9]; R., vol. 3, p. 454, l. 11 to p. 453, l. 20.)

SUMMARY OF ARGUMENT

This is the most recent example of a series of cases in which the Fifth Circuit has circumvented the protections afforded by the Fourteenth Amendment Due Process Clause and Fed. R. Civ. P. 56 by manipulating the harmless error exception to swallow the rule that a non-movant must receive notice before a District Court *sua sponte* dismisses claims not raised in a motion for summary judgment. The Fifth Circuit held that it was harmless for the District Court to dismiss breach of written and oral contract claims, in response to Harris County's motion for summary judgment, when Page's breach of contract claims were not even on file when Harris County filed its motion for summary judgment. No one gave Petitioners proper notice that *all* claims were subject to dismissal pursuant to Harris County's partial motion for summary judgment.

Petitioners also request this Court to rule that multi-jurisdictional, anti-drug task forces are not above the law they enforce. This will require the Court to clarify the viability, scope and nature of the "state-created danger" theory of constitutional liability. Currently, there is a split among the circuits regarding the application of the "state-created danger" theory to non-custodial situations in 42 U.S.C. § 1983 actions. Previously, this Court has expressly limited constitutional liability for private violence to circumstances where a "special relationship" exists. A special relationship only exists when the State has an individual in custody.

Because of the proliferation of multi-jurisdictional anti-drug task forces, it is important for this Court to state that those task forces are not unaccountable rōgue elephants acting above the law. Petitioners request this Court to rule that multi-jurisdictional task forces are state actors liable for the acts of their constituent law enforcement agencies when those acts result in the death of a person assisting them to wage the government's war against drugs, and then clarify the nature and scope of the task force's duties.

This Court has previously suggested that where the State affirmatively creates a danger to a private citizen, then makes that citizen more susceptible to private violence than otherwise would have been the case, the State may be liable for violation of that citizen's civil rights, even though the State was not a direct perpetrator. The Fifth Circuit failed to acknowledge this state-created danger theory of liability pled in Petitioners' Third Amended Original Complaint, and has repeatedly criticized the doctrine. The Fifth Circuit's minority view is inconsistent with the Fourteenth Amendment. This Court should reconcile the splits among the circuits regarding the nature and scope of the doctrine.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT HAS CIRCUMVENTED THIS COURT'S NOTICE REQUIREMENTS BY ERRONEOUSLY APPLYING A HARMLESS ERROR ANALYSIS THAT UNDERMINES FED. R. CIV. P. 56's NOTICE PROTECTIONS AND DEPRIVES THE NON-MOVANT OF HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

A. The Fifth Circuit erroneously affirmed a *sua sponte* summary judgment and dismissal on a breach of contract claim that Respondents Harris County and the Task Force did not argue or brief, without granting Petitioners the requisite notice.

Harris County moved for summary judgment on Petitioners' claim that there was a "special relationship" between Harris County, the Task Force, and decedent Page. (R., vol. 4, p. 135.) It claimed that "the outcome of this case is controlled by . . . *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995)." (*Id.*) Harris County further argued that it and the Task Force had no duty to

protect Page because there cannot be a special relationship invoking § 1983 liability unless a person is in state custody. (*Id.*, and p. 134.) It ignored Petitioners' other 42 U.S.C. § 1983 theories of liability.

The Magistrate agreed with Harris County, and recommended that the District Court grant Harris County a summary judgment on Petitioners' § 1983 claim and Petitioners' claims based on the Texas Tort Claims Act. (Pet. App. D at 32a and 45a.) The Magistrate also stated that Petitioners could not make a *prima facie* claim to an entitlement to a protected property interest[1], despite the ample evidence that a contract existed. (Pet. App. D at 44a.)

The Magistrate observed that, "Harris County denies that it had any agreement with Plaintiff for compensation." (Pet. App. D at 43a.) The Magistrate failed to reference any corresponding part of Harris County's motion for summary judgment. (*Id.*) Although the Magistrate stated that no contract existed, implying the claim's dismissal, she contradicted herself by also suggesting that the District Court's ruling would only grant a ***partial*** summary judgment. (Pet. App. D at 28a, n.2.) Petitioners repeatedly objected to the Magistrate's erroneous, *sua sponte* conclusions about their contract claim. (R., vol. 1, pp. 848-45, esp. ¶ 19 on p. 848.)

The District Court misunderstood the Magistrate as recommending the dismissal of ***all*** claims, including the contractual one, denying Petitioners notice that their breach of contract claim was vulnerable. (Pet. App. B at 9a.) Petitioners asserted the contractual claim (R., vol. 3, pp. 543-41, ¶¶ 17-19, p. 539, sub-¶ 6, p. 538, sub-¶¶ 5-6) in their Third Amended Complaint (R., vol. 3, pp. 553-34) *after* Harris County filed its

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1. Petitioners' breach of contract claim was independent from the claim that Harris County's and the Task Force's conduct constituted a deprivation of an entitlement under 42 U.S.C. § 1983. (R., vol. 2, p. 541, ¶ 19.)

motion for summary judgment, and after the district court expressly granted Petitioners leave to amend. (R., vol. 3, p. 579; pp. 535-33.)

Harris County's motion for summary judgment did not provide Petitioners with the required notice of the District Court's intent to dispose of the contract claim arising from Page's C.I. contract, styled as a "Cooperating Individual Agreement." (R., vol. 4, pp. 135-26.) Nor did Harris County's motion provide Petitioners with adequate notice ***all*** claims were in jeopardy of dismissal. Thus, the District Court's summary judgment came as an unwelcome surprise for the Petitioners.

The Fifth Circuit summarily affirmed the District Court's erroneous summary judgment, citing the "harmless error" rule. (Pet. App. A at 7a.) This is just the most recent in a series of decisions in which the Fifth Circuit has relaxed to the point of abandonment the summary judgment notice protections set forth in Fed. R. Civ. P. 56, which are meant to ensure that a party receives the due process guaranteed to a citizen under the Fourteenth Amendment.

In *Turco v. Hoechst Celanese Chem. Group, Inc.*, 101 F.3d 1090 (5th Cir. 1996) (motion for reconsideration *en banc* overruled), for example, the Fifth Circuit ruled that one issue, though "**raised in a footnote**, [c]learly places Turco on notice that the issue of qualification was part of the summary judgment [motion] submitted by the defendant." *Id.* at 1093. There, the "notice" afforded the non-movant was a single statement contained in the third sentence of a footnote (the ninth footnote) on the tenth page of a motion for summary judgment based on other grounds; grounds that the District Court overruled. Further, the movant had stated that its footnote argument was "moot" in light of its central summary judgment arguments, which the District Court overruled. Citing *United States v. Houston Pipeline*, 37 F.3d 224, 227 (5th Cir. 1994), the *Turco* Fifth Circuit panel held that "a district judge is not compelled to limit the

basis for a summary judgment on those facts listed in the motion for summary judgment." *Turco*, 101 F.3d at 1093.

In so relaxing its review of summary judgments, the Fifth Circuit has even repudiated its prior precedent. It had previously held that a motion for summary judgment with respect to some claims does not justify a trial court's dismissal or disposition via summary judgment of *other* claims. *Judwin Props., Inc. v. United States Fire Ins. Co.*, 973 F.2d 432, 436-437 (5th Cir. 1992) (when a defendant moves for summary judgment only on a plaintiff's breach of contract claims, the district court errs if it also grants *sua sponte* summary judgment on the plaintiff's tort claims).

In *Arkwright-Boston Mfgrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 444-45 (5th Cir. 1991), the Fifth Circuit had also held that the non-movant must be adequately informed of the precise grounds on which a summary judgment is to be granted, and summary judgment is proper only if the respondent is given a reasonable time to respond.

Similarly, in *N.L.R. Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957 (5th Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992) ("GHR"), the Fifth Circuit ruled that the "any realistic doubts about whether the [non-movant] received notice that its entire case was at risk must be resolved in favor of the [non-movant]," *id.*, 940 F.2d at 965. In that same case, it ruled that the "portion of the summary judgment which granted [defendant] relief exceeding that which is requested is reversed." *Id.*, 940 F.2d at 965-66. *See also John Deere Co. v. American Nat'l Bank, Stafford*, 809 F.2d 1190, 1191-92 (5th Cir. 1987) ("Although the Bank's memorandum states the position that John Deere's interests were unaffected by the foreclosure sale, this point is not argued as a ground for summary judgment . . . a district court may not grant summary judgment sua sponte on grounds not requested by the moving party.")

B. The Fifth Circuit has abandoned this Court's notice requirements in summary judgment hearings under *Atchinson, Topeka* in a manner that deprives the non-movant of due process.

Since 1994, however, the Fifth Circuit has abandoned its prior adherence to this Court's teachings about summary judgment law. Prior to 1994, the Fifth Circuit's handling of summary judgment appeals accorded with this Court's rulings in *Atchinson, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987) ("*Atchinson*"), where this Court recognized, in the context of a summary judgment appeal, that a non-movant was ***not*** obligated to adduce opposition materials to a ground not expressly included in a summary judgment motion:

> As we have mentioned, petitioner's motion for dismissal or summary judgment was based on the sole ground that an employee's exclusive remedy for a railroad's failure to maintain a safe workplace is to file a grievance under the RLA. Respondent's memorandum, of course, sought to respond to that narrow argument alone . . .

Id., 480 U.S. at 568, n.15. This Court reversed the summary judgment, ruling that the issue had not been developed, and observing that:

> Had petitioner moved for summary judgment on the ground that FELA does not recognize claims for respondent's type of injury, respondent would have had an opportunity to supplement the record with relevant facts to contest that motion. *See* Fed. R. Civ. P. 56(c). ***As we explained last Term, summary judgment is available only when, "after adequate time for discovery and upon***

> ***motion," the party seeking summary judgment has satisfied its "responsibility of informing the district court of the basis for its motion . . ."***

Id. at 568, n.15 (emphasis supplied).

To summarize, Petitioners did not receive adequate *Atchinson* notice that the District Court might dispose of Petitioners' breach of contract claims because Harris County's Motion for Summary Judgment only addressed the "special relationship" theory of 42 U.S.C. § 1983 liability. Petitioners' breach of contract claim was not even on file when Harris County filed its motion. The Magistrate's entry of a *sua sponte* recommendation deprived Petitioners of an opportunity to present all their arguments and evidence regarding their contract claims.

By disregarding this Court's guidance in *Atchinson*, Rule 56, Fed. R. Civ. P., and its own precedent in *GHR, N.L.R. Indus.*, and *John Deere*, the Fifth Circuit denied Petitioners their Fourteenth Amendment right to due process. To protect not only Petitioners' rights but to clarify those due process protections, Petitioners request that this Court grant this petition for *certiorari*.

II.

A MULTI-JURISDICTIONAL TASK FORCE CANNOT HOLD ITSELF UNACCOUNTABLE AND ABOVE THE LAW WITHOUT VIOLATING THE FOURTEENTH AMENDMENT'S GUARANTEE OF DUE PROCESS.

A. Here, the Task Force's policies are, *ipso facto*, also those of Harris County.

The Fifth Circuit suggests that the customs and policies of the Task Force are not the customs and policies of Harris County. "Furthermore, Plaintiffs have failed to prove that any policy of Harris County, whether written or oral, placed Page in a state-created danger." (Pet. App. A.)

Analytically, there can be no Task Force policy or custom that exists independent of Respondent Harris County; the policies of the Task Force ***are*** the policies of Harris County. Harris County participates in the Task Force pursuant to "inter-local" agreements with other municipalities collectively participating in a federally funded program, named the "Harris County Organized Crime and Narcotics Task Force." (R., vol. 3, p. 371, l. 7 – 370, l. 1.) Congress granted the States the federal funds that make multi-jurisdictional task forces possible under the Omnibus Crime Control Act, 42 U.S.C. §§ 3711-3797 (1997).[2]

Further, the Harris County Sheriff's Deputies assigned to the Task Force remain employees of Harris County. As this Court stated in *Gardner v. Broderick*, 392 U.S. 273 (1968):

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2. The Task Force is funded by the "Drug Control & System Improvement Grant Program," one of the criminal justice 'block' grant programs available through the "Office of Justice Programs" ("OJP"), established by the Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. §§ 3711-3797.

> [A policeman] is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other "client" or principal . . . [The] policeman is either responsible to the State or to no one.

Id. at 277-78.

B. Multi-jurisdictional task forces are partnerships comprised of their constituent local government law enforcement agencies, not unaccountable rogue elephants independent of the local governments that staff them.

The federal government has repeatedly declared its resolve to fight a "war on drugs." In this regard, Congress passed the Omnibus Crime Control Act ("O.C.C.A."), to provide substantial drug control grants to the States. It designed these grants to entice the States to cooperate with law enforcement agencies. Under the O.C.C.A., federal agencies such as the DEA developed programs for multi-jurisdictional drug law enforcement to harness the support of state and local police agencies.[3] The proliferation of multi-jurisdictional task forces is one result of this war on drugs. The Fifth Circuit erroneously distinguished the policies of Harris County, a local government unit that participates in the Task Force, from the policies of the Task Force in which Harris County participates.

Harris County cannot escape its liability for constitutional violations by simply suggesting that the Task Force operates independently and under separate policies. *See Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995) ("when a Task Force is an association of various governmental entities setting joint policies and practices for conducting drug investigations and raids, its

3. *See* Sandra Guerra, *The Myth of Dual Sovereignty: Multi-jurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1181-82 (1995).

component members may be sued and are subject to joint and several liability for constitutional violations"). In a criminal context, the Fifth Circuit has held that a task force and its agents are state actors, but "act" on behalf of the government that holds their commission. *See United States v. Spires*, 79 F.3d 464, 467 (5th Cir. 1996).

Pointing a finger at the Task Force does not exonerate Harris County, as Harris County attempted to suggest below. A lawsuit against the Task Force alleging unconstitutional policies is actionable against Harris County. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. at 690 & n.55 (1978); *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) (a suit against "Director of Police, City of Memphis" is a suit against the city); *Leach v. Shelby Cty. Sheriff*, 891 F.2d 1241, 1242, n.1 (6th Cir. 1989) (a suit against the county sheriff is a suit against the county).

Because of the proliferation of multi-jurisdictional task forces across the United States, it is especially important for the Supreme Court to articulate guidelines regarding their constitutional identity and liability to citizens bringing a § 1983 claim.

III.

THE DIVISION BETWEEN THE CIRCUITS REGARDING THE VIABILITY, NATURE AND SCOPE OF THE STATE-CREATED DANGER THEORY UNDER 42 U.S.C. § 1983 CRIES OUT FOR CLARIFICATION ON *CERTIORARI*.

A. Harris County and the Task Force were state actors, acting under color of state law, when they followed the official policy or custom that resulted in the violation of Page's rights, and those of his Survivors.

Since Lord Acton's day, it has been an axiom that power corrupts, and that absolute power corrupts absolutely. As John Locke wrote in his *Treatise on Government* (1690), "Whenever law ends, tyranny begins." This Court should recall those principles when reviewing Harris County's argument that the State owed no duty to protect Page because there can be no judicially-recognized "special relationship" between it and a citizen unless the citizen is in the State's custody.

In making that argument, Harris County ignored Petitioners' other independent and alternative theory of 42 U.S.C. § 1983 liability: state-created danger. The Magistrate refused to apply the doctrine. (R., vol. 1, pp. 869-63.) The District Court ruled accordingly. (Pet. App. B at 9a.) The Magistrate and the District Court erred. When the Fifth Circuit affirmed, it erred, too. (Pet. App. A at 4a-5a.) The result is to render Respondents unaccountable to the citizens they are sworn to protect.

Municipalities can be liable under § 1983 for deprivation of federally-protected rights under an official policy. *See Monell v. Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978). In the district court, Petitioners alleged claims under 42 U.S.C.

§ 1983.[4] (R., vol. 2, pp. 546-41, ¶¶ 13-19 [Plaintiffs' Third Amended Original Complaint].)

Because Harris County and the Task Force are local governmental units as defined in *Monell*, Petitioners had to allege that an official policy or custom of Harris County and the Task Force was a cause in fact of the deprivation of rights. *Id.* at 690-91; *Webster v. City of Houston*, 738 F.2d 838, 841 (5th Cir.) (*en banc*), *mod'd on other grounds on reh'g*, 739 F.2d 993 (5th Cir. 1984) (*en banc*). Petitioners discharged this burden.

Harris County's Task Force had a policy and custom of using C.I.'s as participants in undercover buy-bust operations. (R., vol. 3, pp. 400, l. 14 – p. 399, l. 16.) Sending Page into the suspect's apartment was in accord with Harris County's and the Task Force's customs and policies. (R., vol. 3, pp. 402-401.)

Harris County's and Task Force's policy violated Page's Fourteenth Amendment right to protection under the Due Process Clause, which proximately caused the damages suffered by him, his wife, parents and children. Here, Harris County and the Task Force failed to affirmatively protect Page against bodily injury arising out of a *state-created danger*, because Harris County and the Task Force affirmatively placed Page in a position that stripped him of his ability to defend himself and cut him off from potential sources of private aid.

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4. To state a claim under 42 U.S.C. § 1983, a plaintiff must:

> (1) allege a *violation* of rights secured by the Constitution or laws of the United States; and
>
> (2) demonstrate that the alleged deprivation was committed by a person acting *under color of state law*.

West v. Atkins, 487 U.S. 42, 48 (1988) (emphasis supplied).

B. The Due Process Clause requires the Supreme Court to establish clarifying principles that go beyond *DeShaney v. Winnebago County Dep't of Soc. Servs.*[5]

Since *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), a clear consensus has not emerged on the circumstances that give rise to a constitutional duty of the state to protect persons from acts of private violence. In *DeShaney*, this Court held that members of the public have no constitutional right under the Due Process Clause to sue state employees who fail to protect them against harm inflicted by third parties. *Id.* at 197. *DeShaney* held that it is the State's affirmative act of restraining an individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint on personal liberty, that triggers protection under the Due Process Clause. *Id.* at 200.

Since *DeShaney*, several appellate courts have recognized a duty to provide due process protection outside of custodial situations. Generally, to fall within the parameters of *DeShaney*, plaintiffs have asserted substantive due process claims[6] based

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5. *See* Karen M. Blum, *DeShaney: Custody, Creation of Danger, and Culpability*, 27 Loy. L.A. L. Rev. 435, 478-79 (1994) (Noting that the lower court opinions in this area of affirmative duty theories under the Due Process Clause reflect a sense of confusion.)

6. This Court has recognized three types of claims that may be asserted under the Fourteenth Amendment Due Process Clause. First, the Bill of Rights sets forth specific rights that are incorporated and made applicable to the states by the Amendment. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Second, rights exist to substantive due process, which bars certain arbitrary government actions regardless of the fairness of the procedure used to implement them. *See id.* Third, a right to procedural fairness exists when the state acts to deprive a person of a constitutionally protected interest. *Id.* These actions are brought under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

(Cont'd)

on a breach of the duty to protect in one of two contexts: (1) The plaintiff was in the state's "functional custody" when harmed; or (2) the state created or increased the danger to which the plaintiff was exposed. Several appellate courts have recognized these two contexts as "exceptions" to the general rule set forth in *DeShaney*. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992).

The basis for the "state-created danger" theory is *DeShaney*, where Mr. Justice Rehnquist wrote: "While the State may have been aware of the dangers that Joshua faced . . . , **it played no part in their creation, nor did it do anything to render him any more vulnerable to them.**" *DeShaney*, 489 U.S. at 201 (emphasis supplied).[7]

Petitioners request that this Court expressly state whether the state-created danger theory remains a viable theory of recovery for § 1983 litigants, and, further, clarify the nature and scope of its due process protections.

The gravamen of the state-created danger theory is that although the State did not directly injure the citizen, the State affirmatively acted to create an *inevitable* injury from a third party, and affirmatively acted to foreclose rescue from private

(Cont'd)

> or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7. In fact, the *DeShaney* decision contains *three* references to the State role in creating the victim's danger. The other two are "Petitioners concede the State played no part in creating [the danger to Joshua];" and ". . . voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, . . ." *Id.* at 197 and 201.

sources of aid. In a state-created danger scenario, the third party who commits the violence against the aggrieved citizen is an instrument of State action, regardless of whether the State actor is a conspirator or is only "deliberately indifferent" to the plight of the citizen. For the State action to create a danger, there must be a temporal and causal nexus between the State action and the private violence, so that without the State's participation the violence would never have occurred.

C. The state-created danger doctrine recognizes the state's liability for placing a citizen in a dangerous condition the citizen would not have suffered but for the State.

In one of the earliest "state-created danger" cases, the Seventh Circuit recognized the difficulties inherent in distinguishing what constitutes affirmative state action:

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be hard to say that its rule was merely passive; it is as much an active tort feasor as if it had thrown him to a ***snake pit***.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.) (emphasis supplied); *accord White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979).

The "state-created danger" theory is *not* predicated on a "special relationship" between the individual harmed and the State. *See Kneip v. Tedder*, 95 F.3d 1199, 1205 & 1209, n.22 (3rd Cir. 1996). Consequently, whether the victim is in state custody or voluntarily present when the state creates the danger is not determinative of the state's constitutional duty under the doctrine. The key lies in a state actor's culpable knowledge and conduct in "affirmatively placing an individual of danger, effectively stripping a person of [his] ability to defend himself,

or cutting off potential sources of private aid." *Wideman v. Shallowford, Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987).

D. The Fifth Circuit ignored the rule adopted by a majority of appellate courts when it erroneously refused to hold the Task Force and Harris County liable under the doctrine of state-created danger.

1. At least eight circuits have expressly recognized the state-created danger doctrine.

The vast majority of circuit courts have recognized the "state-created danger" doctrine, though they have utilized a bewildering variety of approaches in analyzing it:

a. The Second Circuit.

In *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2nd Cir. 1993), a group of "skinheads" severely beat a flag-burning protester, on July 4, 1989, in the presence of police officers. The officers made no attempt to protect the plaintiff while he was asserting the First Amendment flag-burning right that this Court has protected. *Id.*, 985 F.2d at 96. The police entered into an agreement with the skinheads that unless "they [the skinheads] got completely out of control the police would neither interfere with their assaults nor arrest them." *Id.* at 97. The Second Circuit interpreted the police officers' agreement and inaction as falling within the "danger creation" language in *DeShaney*. *Id.* at 98 (*quoting DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1004.) The *Dwares* court stated:

> We read the *DeShaney's* Court's analysis to imply that, though an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause, an allegation that the officers [sic] had

> assisted in creating or increasing the danger to the victim would indeed implicate those rights.

Id. at 99. The Second Circuit reversed the dismissal, ruling that the state actors who make demonstrators more vulnerable to assaultive deprivation of civil rights should be subject to § 1983 liability. *Id.* Had the Fifth Circuit applied the *Dwares* standard, it would have reversed the District Court's summary judgment and ruled that the Respondents should be held accountable for increasing the danger that led to the loss of Page's life.

b. The Third Circuit.

In *Kneip v. Tedder*, 95 F.3d 1199, 1211 (3rd Cir. 1996), two intoxicated pedestrians were stopped by the police a block from their home. *Id.*, 95 F.3d at 1201. Mrs. Kneip was so intoxicated she could not stand alone. *Id.* After being questioned separately, Mr. Kneip was given permission to return home to meet the babysitter. *Id.* at 1202. The police left Mr. Kneip with the impression that his wife would be taken to a hospital. *Id.* Instead, she was left alone, and later fell down an embankment causing profound brain damage. The Third Circuit reversed a dismissal, and expressly adopted the state-created danger theory as a viable mechanism for a § 1983 claim. *Id.*, 95 F.3d at 1205. The court expressly held that a "special relationship" requirement was not necessary to assert a state-created danger claim. *Id.*

c. The Sixth Circuit.

In a pre-*DeShaney* case, *Nishiyama v. Dickson Cty.*, 814 F.2d 277, 282-83 (6th Cir. 1987) (*en banc*), the parents of a girl killed by an inmate-trusty driving a fully equipped official patrol car with the authorization of the sheriff, brought a § 1983 action against the sheriff. *Id.*, 814 F.2d at 279. The Sixth Circuit reversed, holding that the state actor defendants facilitated the crime by "providing the criminal with the necessary means and

the specific opportunity to commit his crime." *Id.* at 281. Had the Fifth Circuit applied *Nishiyama*, it would have reversed the Respondents' summary judgment.

d. The Seventh Circuit.

In *White v. Rochford*, 592 F.2d 381, 382-83 (7th Cir. 1979), police officers arrested the uncle of three minor children for drag racing on a highway. *Id.*, 592 F.2d at 382. The officer refused the uncle's requests that the children be taken to the police station or a telephone to contact their parents, and abandoned all three children on the side of the highway. *Id.* The children had no alternative but to leave the car, cross eight lanes of traffic in the dark, and wander the freeway in search of a telephone. *Id.* The Seventh Circuit concluded that the State's failure to aid the children was tantamount to discharging the children to the same busy highway. *Id.* at 384.

e. The Eighth Circuit.

In *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990), the court considered the plight of a woman killed by her estranged husband after the chief of police had directed his officers to ignore her complaints that her husband was threatening her. *Id.* The Eighth Circuit concluded that *DeShaney* would not bar a § 1983 claim asserting that the violence complained of "was not solely the result of private action, but it was also the result of an affirmative act by a state actor to interfere with the protective services" otherwise available in the community. *Id.*, 911 F.2d at 54-55.

f. The Ninth Circuit.

In *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990), the Ninth Circuit expressly applied the state-created danger doctrine. The plaintiff brought a § 1983 action against the State after being forced to accept a

ride home with a stranger who later raped her as a result of a State Trooper's actions. *Wood*, 879 F.2d at 586. The plaintiff claimed that because the state trooper arrested the driver and impounded the car in which she was riding, she would not have been left alone on the side of the road in a high crime area, and vulnerable to the rape. *Id.* The Ninth Circuit reversed a summary judgment, concluding that the plaintiff stated a claim under § 1983. *Id.* at 596.

The Ninth Circuit refined the state-created danger analysis in *L.W. v. Grubbs*, 974 F.2d 119, 121-22 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993). The *Grubbs* court explained that the touchstone for the "danger creation" exception involves "*affirmative conduct* on the part of the state in placing the plaintiff in danger." *Id.*, 974 F.2d at 121 (emphasis supplied). L.W., a registered nurse employed by the State of Oregon at a medium security custodial institution for young male sex offenders, was raped by an inmate. *Id.* at 120. The defendant state employees who supervised L.W. hired her to work in the institutions' medical clinic. Then they selected a violent sex offender, who had failed all previous treatment programs, to work alone with L.W. Once alone with L.W., Grubb repeated his prior criminal acts, battering, robbing and raping L.W. *Id.* The Ninth Circuit reversed the summary judgment, holding that the state affirmatively created the dangerous situation which resulted in L.W.'s assault. *Id.* at 122. Had the Fifth Circuit applied *Grubbs* in this case, it would have reversed the Respondents' summary judgment, holding that the Task Force's and Harris County's affirmative conduct placed Page in the dangerous circumstances where he lost his life.

g. The Tenth Circuit.

In *Uhlrig v. Harder*, 64 F.3d 567, 572, n.7 (10th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 924 (1996), a mental hospital patient killed an activity counselor after administrators eliminated a special unit in the mental hospital reserved for the

criminally insane, causing the transfer of the killer to the general hospital population. *Id.*, 64 F.3d at 570. The Tenth Circuit expressly recognized the "danger creation" theory, but affirmed the lower court because the plaintiffs failed to meet the elements of the state-created danger exception. *Id.* at 567-77.

h. The Eleventh Circuit.

In *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), two prison inmates, while working with a community work program in Highland Lake, Alabama, abducted a town hall employee and terrorized her for three days, finally leaving her tied to a tree. *Id.*, 880 F.2d at 349-50. The Eleventh Circuit found that the state both created the danger to the plaintiff presented by the work squad inmates, and increased her vulnerability to that danger. *Id.* at 355-56. There was a sufficiently close nexus between the state's actions and the third parties' crimes. *Id.* at 357.

2. Swimming against the stream, the First Circuit has refused to recognize the state-created danger doctrine.

In *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 993 (1st Cir. 1992), the First Circuit recognized the created danger language in *DeShaney*, however, the court affirmed the dismissal of the plaintiff's claim because the plaintiff voluntarily sought State mental services, and thus, there was *no* affirmative state act. 961 F.2d at 993. The First Circuit expressly declined to follow the Eleventh Circuit's analysis of the state-created danger doctrine, as enunciated in *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990), thus causing one of the most important splits between the federal circuits.

3. The Fifth Circuit, joining the First Circuit, has repeatedly declined to recognize the state-created danger doctrine.

In contrast to the vast majority of other circuits (except the First, in *Monahan*, as discussed above), the Fifth Circuit has repeatedly declined to recognize the "state-created danger" theory, and has sharply questioned its validity. *Cf. Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997) (*en banc*) ("*Doe*") and *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 530 (5th Cir. 1994) ("*Leffall*"). In *Doe*, the Fifth Circuit continued to demonstrate its disfavor for the doctrine:

> Nor does the state-created danger doctrine save plaintiffs' claims. Its narrow compass is reflected by the reality that we have never sustained liability on this ground.

Id., 113 F.3d at 1415. Further, the *Leffall* court interpreted the *DeShaney* danger creation language as merely a description of circumstances that could give rise to a "special relationship" between the state and an individual. *See* 28 F.3d at 530.

In *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994) ("Johnson"), the Fifth Circuit was asked to address the constitutionality of the state-created danger theory. In *Johnson*, a high school student was killed when hit in the head by a stray bullet fired by an intruder during a disturbance on a high school campus. *Id.*, 38 F.3d at 198. Without ruling on the constitutionality of the state-created danger theory, the Fifth Circuit set out its elements:

> (1) the environment created by State actors must be dangerous;[8]

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8. An undercover narcotics operation is a dangerous environment, virtually as a matter of law. *Williamson v. City of Virginia Beach, Va.*, 786

(Cont'd)

(2) the state actors know it is dangerous;[9] and

(3) but for the exercise of the state actor's authority, the opportunity for the third party's tortious action would not have existed.[10]

Id., 38 F.3d at 201. While never acknowledging it merits, the Fifth Circuit stated that the *Johnson* plaintiffs failed to allege a § 1983 claim in connection with that student's death because they failed to satisfy the elements for a state-created danger claim. *Id.*

In distinguishing *Johnson* from facts which give rise to a state-created danger, the Fifth Circuit stated "no official in the performance of her duties abandoned him in a crack house . . ." 38 F.3d at 200. That is precisely what happened to Page, however. Harris County's and the Task Force's decision to twice send Page into a drug-dealer's cocaine den proximately caused his death.

(Cont'd)

F. Supp. 1238, 1253 (E.D. Va. 1992) (a juvenile informant's mother filed a civil rights action seeking to recover for the son's suicide after he was threatened by persons about whom he had supplied information to the police). The state necessarily endangers a private citizen and his family by using him as an informant. *Id.*

9. During the January 11, 1993 buy-bust, the entire arrest team was wearing body armor except Deputy Smith and Page. (R., vol. 3, p. 456, ll. 6-11.) Virtually all of the deputies testified that they knew that the January 11, 1993 buy-bust was dangerous. (R., vol. 3, p. 334, ll. 4-7; R. vol. 3, p. 365, ll. 5-7; R., vol. 3, p. 433, ll. 3-20.)

10. Respondents admitted that they deliberately sent Page back into the crack house a second time, for the articulated reason of relaying a message. (R., vol. 3, pp. 417 and 421, ll. 13-20].) Informant Page was *obeying orders* from his case officer when he re-entered the fortified apartment. (*Id.*)

In this case, the Fifth Circuit gave discussion of the state-created danger doctrine a meager treatment. However, the opinion reflects confusion regarding the distinction between the requirements for a "special relationship," and the elements of "state-created danger." The court highlights the fact that the C.I. was present in the buy-bust operation *voluntarily*, as if that disqualifies a claim under the state-created danger theory. (Pet. App. A, at 4a.) Although fatal to a § 1983 claim under the "special relationship" theory, the State's lack of control over the victim is irrelevant under the distinctly different state-created danger doctrine. *Kneip v. Tedder*, 95 F.3d 1199, 1211 (3rd Cir. 1996). The relevant question is the state's control over the ***violence***. Whether the private violence would not have occurred but for the State's actions is the primary inquiry.

An opinion from this Court that clarifies the viability, scope and nature of the "state-created danger" theory of constitutional liability is necessary to reconcile the circuit division, and explain the contours of constitutional liability for private violence when the third party is an instrument of the State.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted. Alternatively, the Court should reverse summarily on the basis of *Atchinson, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987).

Respectfully submitted,

KENNETH A. ZIMMERN
Counsel of Record
Two Houston Center
909 Fannin, Suite 1101
Houston, Texas 77010
(713) 751-3131

DAVID A. FURLOW
MORRIS & CAMPBELL, P.C.
600 Jefferson, Suite 1617
Houston, Texas 77002
(713) 659-8697

G.P. HARDY III
HARDY & JOHNS
Two Houston Center
909 Fannin, Suite 500
Houston, Texas 77010
(713) 222-0381

Attorneys for Petitioners

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 1, 1997

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-20688
Summary Calendar

CHANDRELLE L. WHITE-PAGE, individually and as next friend of the minor children of GLEN PAGE, GLEN PAGE, JR. and MARQUS MIGUEL GLENZELL PAGE, and PERCY PAGE and LAVERNE CHERRY, individually and as representatives of the estate of GLEN PAGE,

Plaintiffs-Appellants,

VERSUS

HARRIS COUNTY, ET AL,

Defendants

HARRIS COUNTY; ORGANIZED CRIME AND NARCOTICS TASK FORCE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(H-94-CV02592)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

Appendix A

PER CURIAM:*

This is an appeal from the granting of a summary judgment in favor of Harris County, defendant-appellee, on an action for violations of the Texas Tort Claims Act, 42 U.S.C. § 1983, and an alleged contract agreement. Plaintiffs are the survivors of Glen Page, a confidential informant who was killed during a "buy-bust" sting operation. They allege that the actions of the Harris County Organized Crime and Task Force in executing this operation generated a "state-created danger" which ultimately resulted in Page's death. They also contend that Harris County deprived Glen Page of a property interest without due process by failing to pay him or his survivors for his involvement in the operation in accordance with a "Confidential Informant Agreement". Along the same vein, Plaintiffs also allege a breach of contract.

Texas Tort Claims Act

A governmental body is generally immune from suit unless such immunity is waived by statute. Under the Texas Tort Claims Act, a governmental entity is liable for personal injury and death caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law. *See* TEX. CIV. PRAC. & REM. CODE Ann. § 101.021(2) (Vernon 1986).

The Texas Supreme Court has defined "use" in the context of this statute as "to put forth or bring into action or service; to

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

employ or apply to for a given purpose." *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 33 (Tex. 1983). A non-use of property can not support a claim under the Texas Tort Claims Act. *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994).

Plaintiffs' claims under the Act fails for two reasons. First, Plaintiffs fail to allege any "use" of personal property in any of their complaints that would waive the sovereign immunity found in the Act. Second, they have not alleged any negligence that would be actionable under Texas law if committed by a private person.

Section 1983 Liability

To state a claim under 42 U.S.C. § 1983, a plaintiff must:

(1) allege a violation of rights secured by the Constitution or laws of the United States; and

(2) demonstrate that the alleged deprivation was committed by a person acting under color of state law.

West v. Atkins, 487 U.S. 42, 48 (1988). A governmental entity may be held liable under § 1983 for a deprivation of rights protected by the Constitution or federal law only if that deprivation is inflicted pursuant to an official policy. *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984), *rev'd on other grounds*, 739 F.2d 993 (5th Cir. 1984). We held in *Webster* that "official policy" includes both a written policy and/or a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.

Appendix A

Appellants originally had four theories under which § 1983 was implicated. However, they abandoned two of these four theories on appeal and alleged only "state-created danger" and deprivation of property interest under § 1983.

a. State-Created Danger

Appellants allege that Harris County had a policy of using confidential informants in undercover buy-bust operations in a manner which endangered these informant's lives. More specifically, they allege that Harris County failed to affirmatively protect Page against bodily injury arising out of a state-created danger.

"When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct whether or not the victim was in formal state 'custody.' " *Johnson v. Dallas Indep. School Dist.*, 38 F.3d 198, 200 (5th Cir. 1994), *cert. denied*, __ *U.S.* __, 115 S. Ct. 1361 (1995). However, the environment created by the state actors must be dangerous; they must know that it is dangerous; and, to be liable, they must have used their authority to create the opportunity that would not have otherwise existed for the third party's crime to occur. *Id.* at 201.

Although drug transactions are inherently dangerous, Page's participation in this deal was completely of his own volition. His actions, from the time he made initial contact with Harris County up to the events resulting in his unfortunate death, were voluntary. At no time was Page under the "control" of any Harris County employee in creating the opportunity to complete the transaction.

Furthermore, Plaintiffs have failed to prove that any policy of Harris County, whether written or otherwise, placed Page in a state-created danger.

b. Property Interest

Plaintiffs allege that Page was deprived of a property interest without due process of law when the County failed to pay him for his participation in the drug deal which resulted in his death. They base this contention on an alleged "cooperating individual agreement" which is not in evidence. Appellants claim that Harris County lost this agreement and that the failure to produce this document should shift the burden to the Defendant to prove that the agreement did not create a constitutionally protected property interest. We, as did the district court, disagree. Even though there is some testimony that an agreement *might* have existed, there is no indication nor any evidence that Harris County was a signatory to such an agreement or that an agreement was kept in its custody. Moreover, this agreement cannot be located or was never executed. In any event, without the agreement in evidence, Plaintiffs cannot make a prima facie claim of a protected property interest in compensation.

Plaintiffs have also failed to show that any federal regulations or task force guidelines created any analogous expectations in compensation.

Breach of Contract

Appellants also claim that the district court erred in sua sponte granting summary judgment on their breach of contract claim, an issue that was never addressed in the magistrate judge's memorandum and order. The breach of contract issue was first

raised by the appellants in their response to Harris County's initial motion for summary judgment. Harris County then briefly addressed the issue in its reply to the response. Plaintiffs subsequently filed their third amended original complaint adding this breach of contract claim. The Magistrate then granted Harris County's motion, but made a note commenting that in light of the amended petition this granting of a summary judgment was only a partial summary judgment. The Magistrate never addressed the breach of contract issue except to find that there was no contract and no entitlement to compensation under contract. The district court then adopted the Magistrate's memorandum and order and granted summary judgment on all claims, including the breach of contract claim.

Appellants claim that this was an improper granting of summary judgment because it rested on grounds that were not urged or briefed by the movant. They cite to a number of cases which hold that the granting of a summary judgment is improper when the non-movant has no notice of the grounds upon which the judgment was granted. However, the circumstances presented here are different from the slew of cases cited by the appellant because those cases centered around whether the non-movant had notice of the issue on which summary judgment was granted. In this case, not only did the non-movants have notice, they provided it by writing in depth on an issue that was not even raised in the opposing party's original motion.

The question raised by a court's sua sponte action is whether the party against whom the judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted. *See Nowlin v. Resolution Trust Corp,* 33 F.3d 498, 504 (5th. Cir. 1994). Obviously, both of these requirements were satisfied

under the present circumstances. The Plaintiffs had adequate notice and every opportunity to present a breach of contract case.

Plaintiffs have not been able to prove that a contract existed (based on their property interest claim) and they do not claim to have any additional evidence which may lead us to find otherwise. If there is no contract to prove up a property interest there can be no breach of contract.

If the case is one appropriate for the entry of summary judgment, the fact that it may be granted on a ground different from that specified in the motion does not warrant disturbing the judgment on appeal. *Broderick Woods Prods. Co. v. United States,* 195 F.2d 433, 436 (10th Cir. 1952). "The fact that the judgment was granted on a reason different from that assigned by the defendant [in his summary judgment motion] is immaterial, where, as here, the motion was properly granted on the undisputed facts shown on an issue presented by plaintiff's complaint." *Board of Nat. Missions of Presbyterian Church in the U.S. v. Smith,* 182 F.2d 362, 364-365 (7th Cir. 1950).

Moreover, even if we did find the lower court erred in granting summary judgment, the harmless error doctrine applies because, as stated earlier, Plaintiffs do not claim they have any additional evidence to present and the evidence they have presented does not reflect the existence of a contract. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 28 F.3d 1388, 1398 (5th Cir. 1994).

Based on the foregoing, we accordingly AFFIRM the decision of the district court.

APPENDIX B — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED JULY 2, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. 94-2592

CHANDERELLE L. WHITE-PAGE, PERCY PAGE AND LEVERN CHERRY, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF GLEN PAGE, DECEASED; CHANDERELLE L. WHITE-PAGE, AS NEXT FRIEND OF THE MINOR CHILDREN OF GLEN PAGE, GLEN PAGE, JR. AND MARQUS MIGUEL GLENZELL PAGE

V.

HARRIS COUNTY, HARRIS COUNTY ORGANIZED CRIME AND NARCOTICS TASK FORCE

ORDER AND FINAL JUDGMENT

The Court has reviewed Plaintiffs' Motion for Reconsideration (Docket Entry #72) and the response filed thereto. Plaintiffs' Motion is DENIED.

In their motion, Plaintiffs reurge their contention that because drugs were seized after the ill-fated drug transaction, monies were due to the decedent, Glen Page, pursuant to either the "putative" confidential informant contract[1] or an alleged oral

1. The wording of this form contract is found in the Order of Clarification, Docket Entry #69. In that Order, the Magistrate Judge found that the contract did not establish a right to compensation.

agreement[2]. Even if the court were to assume Plaintiffs' allegations to be true, Plaintiffs have failed to establish that they have a property interest protected by the United States Constitution.

In this action, the court has previously found that as a matter of law, Plaintiffs, Chanderelle L. White-Page, Percy Page and Levern Cherry, individually, and as representatives of the Estate of Glen Page, deceased, and Chanderelle L. White-Page, as next friend of the minor children of Glen Page, Glen Page, Jr. and Marqus Miguel Glenzell Page, have failed to state claims for relief against Harris County under the Texas Tort Claims Act, 42 U.S.C. §1983, and for breach of contract. *See* Docket Entries Nos. 66 and 69. The court has adopted those findings. *See* Docket Entry No. 71.

Based on the above rulings, the Plaintiffs' claims against the Harris County Organized Crime and Narcotics Task Force[3] also fail.

Accordingly, pursuant to Rule 58, Fed.R.Civ.P., all claims of Plaintiffs, Chanderelle L. White-Page, Percy Page and Levern Cherry, individually, and as representatives of the Estate of Glen Page, deceased, and Chanderelle L. White-Page, as next friend of the minor children of Glen Page, Glen Page, Jr. and Marqus Miguel Glenzell Page, are DISMISSED against Defendants, Harris County and the Harris County Organized Crime and Narcotics Task Force.

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2. The Plaintiffs have failed to attach any summary judgment evidence suggesting what the oral agreement provided.

3. The Harris County Organized Crime and Narcotics Task Force had moved for dismissal pursuant to Rule 12(b)(5), arguing that it is not a suable entity. Based on the prior rulings of the court, this motion is MOOT.

Appendix B

All relief sought and not expressly granted is DENIED.

THIS IS A FINAL JUDGMENT.

DONE in Houston, Texas, this 28th day of June

s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF CLARIFICATION AND DEPOSITION EXCERPTS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED FEBRUARY 7, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. 94-2592

CHANDRELLE L. WHITE-PAGE, PERCY PAGE AND LEVERN CHERRY, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF GLEN PAGE, DECEASED; CHANDRELLE L. WHITE-PAGE, AS NEXT FRIEND OF THE MINOR CHILDREN OF GLEN PAGE, GLEN PAGE, JR. AND MARQUS MIGUEL GLENZELL PAGE

V.

HARRIS COUNTY, HARRIS COUNTY ORGANIZED CRIME AND NARCOTICS TASK FORCE AND PETE ALFARO

ORDER OF CLARIFICATION

On October 20, 1995, the court entered its Memorandum and Recommendation in the above-captioned cause. The parties have filed objections to the Memorandum and Recommendation.

I.

Defendant, Harris County objects to the court's statement, "Harris County does not dispute that it had a widespread custom of using undercover "civilians" to introduce undercover officers to drug dealers in order to consummate drug deals in furtherance

of its law enforcement objectives." Harris County apparently does contest this fact and the court stands corrected. That statement is stricken from the Memorandum and Recommendation.

II.

Plaintiffs make several objections to the Memorandum and Recommendation. Each will be addressed in turn.

A. *State-created danger*

Plaintiffs object to the Memorandum as having shifted the burden of proof in a summary judgment motion. Plaintiffs claim that the court must presume Plaintiffs' version of the facts to be correct at the summary judgment phase, *citing Eastman Kodak Co. V. Image Technical Services*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2077 (1992). The court agrees that it must draw all inferences from the facts in favor of the non-moving party.

Here, Plaintiffs' decedent, Glen Page, is not available as a witness. All evidence in this case concerning the incident will necessarily come from the law enforcement officers on the scene. While the court must draw all inferences in favor of Plaintiffs, it does not have to ignore deposition testimony and credit Plaintiffs' speculations as to the motivations and state of mind of the decedent in order to comply with the summary judgment standard.

In this action, Plaintiffs contend that the U.S. Constitution imposed an affirmative duty upon Harris County to protect Glen Page from the unlawful acts of a non-state actor when it instituted

an official policy or practice of using civilian confidential informants. Plaintiffs argue that Page was placed in a "state-created danger" during his participation in a drug deal on January 11, 1993, when he was shot by an alleged dealer during negotiations.

In its prior Memorandum and Recommendation, the court recommended granting Defendant's motion for summary judgment because the summary judgment evidence established that the officers' actions, allegedly in conformance with an official policy or practice, did not constitute a state-created danger as a matter of law.

Plaintiffs argue that the officers admitted that they sent Glen Page back into the apartment in order to relay a message to the drug dealer, thus creating a danger to which liability attached.[1] Even if the court were to assume that Glen Page was sent up to the apartment in order to try to talk the dealer into completing the transaction in the parking lot, Plaintiffs fail to support their theory that the official policy or practices of Harris County created the dangerous situation, of which Harris County was aware, which resulted in Page's death.

Summary judgment evidence established that Glen Page volunteered to become a confidential informant. Deputy Linda Smith testified that she initially met Page on December 9, 1992,

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1. What actually happened is disputed. Smith testified that Page voluntarily bounded up the stairs to talk to the dealer. Sergeant Kessler thought that Smith had sent Page to the apartment only to try to convince the dealer to do the deal in the parking lot. It is unknown whether Sergeant Kessler, who was monitoring the activities by radio, had first hand knowledge that Deputy Smith actually sent Page up to the drug dealer's apartment or if he was assuming that she had done so. *See* Appendix A for deposition excerpts.

after he contacted her with some information he wanted to give to the Harris County Sheriff's Department. (Smith deposition, p. 13, line 8). Page wanted to be a confidential informant. On the first night she met him, he set up a deal which resulted in ten arrests. He set up another deal on December 10, 1992, which resulted in the arrest of eight individuals. (Smith deposition, p. 25, lines 4-13). Page set up deals on December 16 and 17, 1992, and January 7, 1993. (Smith deposition, p. 28, lines 5-18). In fact, according to Deputy Smith, Page wanted to set up drug deals every day and the only reason he didn't was because she couldn't keep up with the paperwork. (*Id.*)

When asked if anything unusual had happened in any drug deals set up by Page prior to the January 11th deal, Smith responded, "They were all real smooth deals." When asked, "He was real good, huh?", she responded, "Yes." (Smith deposition, p. 29, lines 15-17).

It is undisputed that Page set up the drug deal on January 11, 1993. Deputy Linda Smith testified:

> Glen was very excited about doing the deal. He paged me all weekend. And that was very unusual. He was just ready to do this deal. And I told him to call me Monday morning, and he paged me Monday morning. And we were trying to set up a time to meet so I could pick him up and brief him and go and do the deal. He paged me. I met with him and we met with the arrest team to brief to do the deal.

Smith deposition, p. 48, lines 7-16.

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While Smith agreed that buying drugs from dealers can be dangerous and one had to be careful, she believed that Page had more experience than she did in dealing with these kinds of people. (Smith Deposition, p. 37, lines 5-24).

The summary judgment evidence established that Page voluntarily acted to set up various drug transactions with people he knew. Although the officers had the intent to "control" the time and place of the transaction in order to minimize the inherent risk involved in such a situation, Page's involvement was totally voluntary and he could have withdrawn at any time. (Affidavit of Linda Smith, Def. Motion for Summary Judgment, Docket Entry #20). Thus, even if the court were to focus on only one aspect of the incident, as Plaintiffs urge, and assume that Page was sent up to the apartment by Deputy Smith in order to try to persuade the dealer to complete the deal in the parking lot, that fact alone does not establish a policy or practice which created a danger to a confidential informant. Such a focus ignores the overriding fact that Page set up the deal, knew with whom he was dealing, and could have retreated at any time up to the point when, contrary to explicit instructions, he entered the dealer's apartment.

Although Plaintiffs complain that the officers should not have sent Page up to the apartment knowing that there were burglar bars on the apartment, this fact, if true, fails to state a claim that a policy of Harris County created a danger to Page. Even if the deputies were aware of the burglar bars on the dealer's apartment, Page was in an equal or better position to observe the bars and appreciate their significance. There is no evidence that there is an official policy or practice not to tell a confidential informant about burglar bars.

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Plaintiffs urge the court to infer from the summary judgment evidence that Page was "obeying orders" from his "supervisor" when he returned up the stairs to the dealer's apartment. Plaintiffs allege that "an inference should be made in favor of Plaintiffs that Deputy Smith intentionally sent Page into the apartment the second time." Pl. Objections, Docket Entry No. 68, p. 4). Plaintiffs' argument misses the critical issue.

This action, filed pursuant to Section 1983, is not a simple negligence case where there is a standard of care owed to Page by the individual state actors; nor are the state actors sued in their individual capacity. Here, it is alleged that the official policy or practice of Harris County of using civilian confidential informants to set up drug transactions imposed an affirmative duty of care on Harris County to protect the informants from injuries by non-state actors. In other words, that Harris County knowingly placed Page in a dangerous situation from which he could not extricate himself by using him to facilitate a controlled drug transaction. *See*, *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200 (5th Cir. 1994) *cert. denied*, 115 S.Ct. 1361 (1995); *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992).

In order to prevail on their theory, Plaintiffs must show that the official policy or custom of Harris County of using confidential informants affirmatively placed Page in a position of danger, effectively stripping him of his ability to defend himself, or cutting off potential sources of private aid. *See*, *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d at 200.

Here, the facts alleged by Plaintiffs do not rise to the level of a state-created danger consistent with prior case law. For purposes of this order, the court assumes as true that the officers did not permit Page to arm himself or carry the "flash money."

However, the summary judgment evidence does not permit the inference that Page is the sacrifical lamb compelled by the officers to enter a "snake pit" as contended by Plaintiffs. Page placed himself in a position of danger by volunteering to be a paid drug snitch, setting up the deal, aggressively pursuing the completion of the buy-bust deal and voluntarily (and against instructions) entering the dealer's apartment knowing that he had neither a weapon nor money to complete the deal.

Based on the summary judgment record, it does not appear that a Harris County policy or practice *affirmatively* placed Page in a position of danger of which he was not aware. Even if it were true that Deputy Smith sent Page back up to the dealer's apartment for any reason, that fact is not evidence of a policy or practice of Harris County which affirmatively placed Page in danger from which he could not have escaped. It is only evidence of what transpired that day. Isolated facts are not evidence of policy or practices. *Bigford v. Taylor*, 834 F.2d 1213, 1220 (5th Cir.), *cert. denied*, 488 U.S. 851 (1988).

Further, the undisputed evidence that Page acted against Sgt. Kessler's express instructions not to go inside anywhere to complete the deal, is further support that there was no policy or practice of Harris County which affirmatively created a danger from which Page could not have voluntarily retreated. Page's own actions placed him inside a barricaded apartment with a drug dealer with whom he voluntarily made contact.

To apply the state-created danger theory to the present case would expand the liability of the state far beyond the parameters of the present case law. While it is a tragedy that Page lost his life, it cannot be said that Harris County's policy affirmatively placed Page in a position of danger, effectively stripping Page

of the ability to defend himself and cutting off private sources of aid. *See, Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987).

B. *Property Interest*

Plaintiffs contend that the summary judgment evidence established that a contract existed between Glen Page and Harris County which created a property interest. Harris County denies that there was a contract signed because the alleged contract cannot be located. Deputy Smith testified at deposition that she believed that Page had signed a "Cooperating Individual Agreement."

Even if the court assumes that Plaintiffs have raised a fact issue that the agreement was signed by Page and Harris County, a review of the putative agreement does not appear to establish a right to compensation. The terms read as follows:

> 1. I will not violate criminal law in furtherance of gathering information or providing services to the Task Force. Any evidence of such a violation will be reported by the Task Force to the appropriate law enforcement agency.
>
> 2. I have no official status implied or otherwise, as an officer or employee of the Task Force or any of its component agencies.
>
> 3. The information I provided may be used in a criminal proceeding and I may be called

upon to testify to such information in a court of law and although the Task Force will use all lawful means to protect my confidentiality, this cannot be guaranteed.

4. Any monies that I may receive as payment or aware are considered income and as such is considered taxable by the IRS. I understand that it is my responsibility to declare said monies as income for tax purposes.

This agreement, assuming Page had signed it, does not entitle Page to receive compensation for his activities and does not appear to implicate a property interest.

Although Deputy Smith testified that informants were compensated based on results of their activities, there is no evidence in the record that any drugs were seized or that any person was arrested or prosecuted for any drug offense stemming from the deal set up by Page on January 11, 1993. The record is silent as to any entitlement to compensation for his activities on January 11, 1993, which rises to the level of a property interest.

Based on the foregoing clarifications, the recommendations of the undersigned contained in the October 20, 1995 Memorandum and Recommendation remain the same.

The Clerk shall send copies of this Order to the respective parties who have ten (10) days from the receipt thereof to file written objections thereto pursuant to General Order 80-5. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings on appeal.

Appendix C

The original of any written objections shall be filed with the United States District Clerk, P. O. Box 61010, Houston, Texas 77208. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

DONE in Houston, Texas, this 5th day of February, 1996.

s/ Nancy K. Johnson
NANCY K. JOHNSON
UNITED STATES MAGISTRATE JUDGE

Appendix C

Deposition Excerpts concerning Decedent's Presence in Apartment

1. Deputy Linda Smith testified at her deposition:

> So we both got out of the car. And the undercover vehicle was parked closest to the stairway, so Glen got to the stairs first. And we walked up the stairs. I got a few steps up and a black male came to the door and said, "Only one can come in." And Glen just bounced up the stairs and went inside. So I went back to the undercover vehicle, got on the radio, told them what was going on. And Glen never came out.

Smith deposition, p. 50, lines 15-24.

Smith was also asked, "In fact, Glen was sent up to the apartment to get the suspects; isn't that right?" Smith answered, "Glen went up the stairs to get DePriest to come to the car, to do the deal." Smith deposition, p. 62, lines 12-16.

2. In an affidavit attached to Defendant's Motion for Summary Judgment, Smith averred that she did not send Glen Page into the apartment.

3. Sgt. Kessler testified at his deposition:

At the briefing, I told both of them (Deputy Smith and Glen Page) not to got inside the apartment.

Kessler deposition, p. 76, lines 16-17.

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When asked why he told them not to go into the apartment when the deal was originally set to occur at Eric's Barbeque, Kessler responded, "I said, 'Do not go inside a location.' " Kessler deposition, p. 76, lines 21-22.

Plaintiffs' counsel questioned him, "Well why was Glen Page allowed to enter the upstairs apartment, when you had given Deputy Linda Smith express directions to keep him out of there?" Kessler answered, "He went against our will and what we told him to do." Kessler deposition, p. 78, lines 10-15.

The deposition continued:

Counsel: Now the CI informs the undercover that the dope is on the table, but they want to do the deal inside the apartment. Did the undercover agent [Deputy Smith] relay that to anybody on the radio?

Kessler: Yes, she did.

Counsel: And what was your response?

Kessler: I don't know what response I made back to her. I think she responded that she was going to send him back up to try to bring them outside.

Counsel: You had told her specifically not to enter the apartment. Those were your orders to the deputy, correct?

Kessler: That's true.

Counsel: And that was to protect her from danger. You didn't

want to put her in a dangerous situation in that apartment, right?

Kessler: I didn't want to put either one of them in a dangerous situation.

* * *

Counsel: This report or explanation marked as Exhibit 1 then continues to say, "Deputy Smith then claims to have said, 'No, they were supposed to do the deal in the parking lot. Let me go upstairs and see if I can talk them into doing the deal at the car.' " Is that your understanding of what happened?

Kessler: Yes.

Kessler deposition, p. 81, lines 3-22, p. 82, lines 2-10.

Plaintiffs' counsel asked Sgt. Kessler whether Deputy Smith sent Glen Page *into* the apartment. Kessler answered, "Not to my knowledge. She sent him to the apartment." Counsel questioned, "So you make a distinction between sending him into the apartment or sending him to the apartment; is that right?" Kessler answered, "He was sent to the apartment, to the door, to bring them down." Kessler deposition, p. 114, lines 2-8.

The deposition continues:

Counsel: Your statement says, "At approximately 6:35 p.m. confidential source, Glen Page, came out to the car and advised Linda Smith that Moses and an unknown

other black male wanted her to come up to the apartment and do the deal." What did you mean by that?

Kessler: That they wanted her to come inside and do the deal inside there, and bring the money.

Counsel: They wanted her to come inside the apartment. Is that what you meant to say?

Kessler: And bring the money, yes.

Counsel: And did she radio that to you?

Kessler: Yes.

Counsel: What did you say?

Kessler: No.

Counsel: Your statement then says, "Linda Smith refused and sent confidential source back up to the apartment," and that's the same language you used in the preceding sentence where you say, "Moses and an unknown other black male wanted her to come up to the apartment and do the deal." You used the same words, haven't you?

Kessler deposition, p. 115, lines 2-25.

4. Deputy Terry Ashabranner, who was watching the deal from a distance and monitoring the police radio, testified:

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Ashabranner: The next step was Linda was wanting to actually go in and do the deal, based on the fact that Glen said the dope is there. * * * And it was my impression that Linda wanted to go in and do the deal there at the apartment.

Counsel: Okay What did she say that led you to that?

Ashabranner: It was the conversation. She said the dope is here. They want us to go inside and do it. * * * At some time she broke on the radio. Sergeant Kessler got on the radio and said, "No, we're not going to go inside and do it. Tell him" meaning Glen — "tell Glen to go tell them to come outside and do the deal or we're leaving." That was the instruction I understood. * * *

Counsel: Who was to tell them that, Glen?

Ashabranner: Glen was to tell them. You know, no deal. It's going in the parking lot or the deal is not going. It was my impression that was being related for Glen's behalf, to tell them no. Because they're the ones talking to Glen.

Counsel: So he didn't say Glen needs to go back. He didn't say that. What did he say?

Ashabranner: I believe, to the best of my recollection, he said, "Tell them we're going to do it in the parking lot or no deal, let's leave."

Counsel: In other words, he's talking to —

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Ashabranner: He's talking to Linda.

Counsel: — Deputy Smith?

Ashabranner: Of course, Glen is standing there. He can hear the radio also. That's all I can tell you. To the best of my memory, those were the words that were spoken.

Counsel: So after this, what happened?

Ashabranner: Glen went back upstairs, in my opinion, to tell them to come down here and do it in the parking lot or we're leaving. And he went upstairs. He stood at the door, the best I can remember, just a couple of seconds and went right on in.

Counsel: Deputy Smith testified that she also went with him to the staircase. Is that your —

Ashabranner: She got out of the vehicle. I don't know if she made it all the way to the staircase or not. But she got out of the vehicle, but she turned around and came back.

Ashabranner deposition, p. 66, line 18 — p. 69, line 6.

APPENDIX D — MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED OCTOBER 20, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. 94-2592

CHANDRELLE L. WHITE-PAGE, PERCY PAGE AND LEVERN CHERRY, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF GLEN PAGE, DECEASED; CHANDRELLE L. WHITE-PAGE, AS NEXT FRIEND OF THE MINOR CHILDREN OF GLEN PAGE, GLEN PAGE, JR. AND MARQUS MIGUEL GLENZELL PAGE

V.

HARRIS COUNTY, HARRIS COUNTY ORGANIZED CRIME AND NARCOTICS TASK FORCE AND PETE ALFARO

MEMORANDUM AND RECOMMENDATION

CAME ON for consideration the Defendant Harris County's Motion for Summary Judgment (Docket Entry #20) and the responses filed thereto. This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. §636 (b)(1)(A) and (B) and the Cost and Delay Reduction Plan under the Civil Justice Reform Act (Docket Entry #31).

After considering the motions and applicable law, the court RECOMMENDS that Defendant Harris County's Motion for Summary Judgment be GRANTED.

Appendix D

I. *Procedural Background*

On July 29, 1994, Chandrelle L. White-Page, Percy Page and Levern Cherry, individually and as representatives of the estate of Glen Page, deceased, Chandrelle L. White-Page, as next friend of the minor children of Glen Page, Glen Page, Jr., and Marqus Miguel Glenzell Page ("Plaintiffs") filed this action claiming that Defendants Harris County and the Harris County Organized Crime and Narcotics Task Force[1] violated their civil rights contrary to the Civil Rights Act, 42 U.S.C. §1983 and their rights under the Texas Tort Claims Act. Plaintiffs have amended their lawsuit on March 3, 1995, on May 10, 1995 and most recently on July 19, 1995. In their latest complaint, Plaintiffs have also requested relief under the Uniform Declaratory Judgment Act, 28 U.S.C. §2201, et seq., as well as pendent claims of breach of contract, negligence and gross negligence .[2]

Defendant Harris County has moved for summary judgment, claiming that as a matter of law, it did not violate any constitutional right of decedent, Glen Page, or alternatively that it is protected by governmental immunity. Harris County further claims that Plaintiffs' action for negligence and gross negligence

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1. Plaintiff has attempted service of process on the Harris County Organized Crime and Narcotics Task Force by serving Pete Alfaro, Mayor of the City of Baytown. By separate motion, Alfaro has moved to dismiss the lawsuit against the Task Force, claiming among other things, that the Task Force is not a legal entity, capable of being sued. If the recommendation of this court is adopted, Plaintiffs' claims against the Task Force also fail for the same reasons.

2. Based on the recent amendments to the complaint, Defendant's motion for summary judgment is now more correctly considered a motion for partial summary judgment.

is barred by sovereign immunity because the Texas Tort Claims Act is not applicable under the facts of this case.

II. *Summary Judgment Standard*

In order to be entitled to summary judgment, the moving party must establish the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Applicable substantive law determines what factual issues are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Federal Rule of Civil Procedure 56(c) sets forth the types of evidence which may be considered when reviewing a motion for summary judgment. That evidence includes pleadings, depositions, answers to interrogatories, admissions on file and affidavits.

When considering the evidence submitted in support and in opposition to a motion for summary judgment, the Court must draw all reasonable inferences from the underlying facts in favor of the non-moving party. *Anderson*, 477 U.S. at 225. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). All doubt as to the existence of a material fact must also be resolved in favor of the non-movant. *Hayden v. First National Bank of Mount Pleasant, Texas*, 595 F.2d 994, 996-97 (5th Cir. 1979). If reasonable finders of fact can differ regarding a genuine issue of material fact, summary judgment should not be granted. *Anderson*, 477 U.S. at 250-51.

III. *Texas Tort Claims Act*

Harris County has moved for summary judgment, claiming

that the undisputed facts do not overcome its affirmative defense of governmental immunity. Here, Plaintiff's own summary judgment evidence shows that the decedent, Glen Page, entered a drug dealer's apartment, contrary to the officers' instructions, in an attempt to persuade the dealer to complete the deal in the parking lot. In their various complaints, Plaintiffs generally allege that the County failed to provide protective gear to Glen Page before he attempted to transact the drug deal. In their response to Defendant's Motion for Summary Judgment, Plaintiffs do not discuss the lack of protective gear as the basis for the County's liability under the Texas Tort Claims Act but state for the first time that County employees "misused" tangible property of the County when the deputy sheriffs refused to let Page have "flash money" to complete the drug deal which resulted in Page's death. Even if the Court were to require Plaintiffs to amend the complaint a fourth time to add this allegation, Plaintiffs cannot state a claim for relief under the Act.

A governmental body is generally immune from suit. Harris County is immune from liability for negligence unless such immunity is waived by statute. *City of Denton v. Van Page*, 701 S.W.2d 831 (Tex. 1986). Persons having claims against a governmental entity may sue for damages, but only to the extent allowed under the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code §101.025 (Vernon 1986); *University of Texas Medical Branch at Galveston v. York*, 871 S.W.2d 175 (Tex. 1994).

The Texas Tort Claims Act provides that a governmental entity is liable for personal injury and death caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law. Tex. Civ. Prac. & Rem. Code §101.021(2) (Vernon 1986).

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Texas courts have defined "use" in the context of this statute as "to put or bring into action or service; to employ for or apply to a given purpose." *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 33 (Tex. 1983). A non-use of property does not trigger the waiver provision of the statute. *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994) Under §101.021(2), the property in issue must be tangible.

Here, Plaintiffs have failed to allege any "use" of tangible personal property in either their Original, First, Second or Third Amended Complaints which would fall under the waiver of sovereign immunity found in the Texas Tort Claims Act. The complaint generally alleges that Harris County failed to provide Glen Page with the necessary equipment to protect himself before he went into the drug deal. This allegation is insufficient to raise a claim under the Act.

Plaintiffs' last minute " 'misuse' of the flash money" argument, contained in their response to the summary judgment motion, must fail for similar reasons. While the alleged use/non-use of "flash money" is never discussed in any complaint, Plaintiffs' response stated:

> When Glen Page tried to use the flash money to maintain his cover and "do the deal," Deputy Smith refused. Instead, she sent him back into the apartment without the flash money despite the danger. (Docket Entry #45, at p. 24).

While Plaintiffs attempt to characterize the Deputy's refusal to allow Page to use the flash money as a "misuse", it is clear that the governmental tangible property -- the flash money —

was never used. The fact that flash money was *not* given to Page cannot be characterized as a misuse of the money because the money was not put to *any* use.

Further, under Section 101.021(2) the governmental entity is liable only if it "would, were it a private person, be liable to the claimant according to Texas law." *Wyse v. Department of Public Safety*, 733 S.W.2d 224, 228 (Tex.App. — Waco 1986, writ ref'd, n.r.e.), Plaintiffs have not alleged any negligence that would be actionable under Texas law if committed by a private person. In order for Plaintiffs to prevail under this theory, the law would have to impose a duty of care on a drug dealer to train and protect his agents who negotiate drug transactions on his behalf. The court does not understand this to be the law in the State of Texas. Therefore, the Harris County deputy sheriffs who utilized Page as an undercover informant or agent, did not owe Page a duty of care recognized by Texas law.

Accordingly, it is the RECOMMENDATION that Defendant's Motion for Summary Judgment be GRANTED as to Plaintiffs' state law tort claims.

IV. *Section 1983 Liability*

In order to state a claim for relief under Section 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994).

A governmental entity may be held liable under Section

1983 for a deprivation of rights protected by the Constitution or federal law only if that deprivation is inflicted pursuant to an official policy. *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984). Such a policy may include "a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Webster*, at 841.

Further, injuries resulting from a governmental entity's failure to train or to supervise its employees can give rise to Section 1983 liability only where the inaction is indicative of an official policy or custom that manifests deliberate indifference towards the rights of the injured persons. *See*, *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). There must be an affirmative link between the training inadequacies alleged and the particular constitutional violation. *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n. 8 (1985); *City of Canton*, 489 U.S. at 391.

Here, Plaintiffs claim that Harris County had a policy of using confidential informants in undercover drug operations. According to Plaintiffs, Decedent Glen Page was unlawfully deprived of constitutionally protected liberty and property interests by Harris County's custom of using confidential informants in four respects.

First, Plaintiffs claim that Page was in the equivalent of state custody, thus triggering a "special relationship" or duty to protect by the county sheriffs. Plaintiffs also claim that the county created the danger, and therefore was responsible to protect Page. Additionally, Plaintiffs argue that the Harris County policies governing the spending of federal grant monies created a protected liberty interest "in freedom from confinement in a

jail-like residence during an undercover buy operation." (Docket Entry #45, p. 17). Plaintiffs also claim that task force guidelines which required an officer to give clear, concise and consistent instruction, to ensure that a confidential informant conducted himself in a safe manner, rose to the level of a protected liberty interest. Finally, Plaintiffs contend that Page was deprived of his "property interest" in protective services and financial compensation.

In response, Harris County does not dispute that it had a widespread custom of using undercover "civilians" to introduce undercover officers to drug dealers in order to consummate drug deals in furtherance of its law enforcement objectives. Harris County argues that it had no duty to protect the confidential informant under any theory of liability put forth by Plaintiff. Harris County denies that its policies created any liberty or property interests under the facts of this case.

a. *Special Relationship*

It is well-settled that a state's "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 197 (1989). In *DeShaney*, the Supreme Court rejected the contention that the county social workers' failure to intervene and remove the plaintiff from his father's custody until a severe beating sent the plaintiff into a life-threatening coma deprived plaintiff of his liberty without due process of law. Citing the general rule that a state's failure to protect an individual from private violence is not a constitutional violation, the Court concluded that the plaintiff had not demonstrated a "special relationship" which would justify an exception to the general rule. *Id.* at 197-200.

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Harris County, citing *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995), claims that it had no "special relationship" with Glen Page which created a constitutional duty to protect Page under the circumstances of this case. The court agrees.

In *Walton v. Alexander*, plaintiff was a student attending a state school for the deaf. Students residing on campus were under twenty-four hour custody and strict rules concerning their activities, as well as close supervision by school employees. While living on campus, plaintiff was sexually assaulted by another student. Following the incident, both students were counseled, suspended and placed in separate dormitories. When budgetary constraints forced the closing of one dorm, they were housed in the same building. A second sexual assault followed. Plaintiff sued the school superintendent, claiming that he was in a "special relationship" with the school because of the custodial rules and thus triggering a duty to protect his bodily integrity from third-party, non-state actors.

The Fifth Circuit Court of Appeals held that under the facts presented in *Walton*, no "special relationship" was created by the restrictive rules of the school. The court stated:

> Although we agree that a very narrow class of persons who stand in a "special relationship" with the state enjoys a clearly established constitutional right to some degree of state protection from known threats of harm by private actors, this "special relationship" only arises when a person is involuntarily confined or otherwise restrained against his will pursuant to a governmental order or by the affirmative exercise of state power.

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The court has consistently required a "custody" element in finding a "special relationship" protected by the Constitution. *See, Piotrowski v. City of Houston*, 51 F.3d 512, 515, fn. 6 (5th Cir. 1995) (affirmative acts of police officers preventing a third party from warning plaintiff of threats to her life did not create a "special relationship" that required police protection); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994) (student accidently shot in the school parking lot after a dance was not in a "special relationship" with the school officials, giving rise to a duty to protect student); *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990), *cert. denied*, 498 U.S. 1040, (1991) ("special relationship" stems from the limitation which the state has placed on the individual's ability to act on his own behalf, and not from the state's knowledge of the individual's predicament or from its expressions of intent to help him).

Most recently, in *Leffall v. Dallas Indep. Sch. Dist.*, *supra*, the court of appeals analyzed the apparent conflict between cases in which it found a "special relationship" between prisoners and the state, which required the state to protect a prisoner from known threats from fellow prisoners or guards, and *de Jesus Benavides v. Santos*, 883 F.2d 385, 386-7 (5th Cir. 1989) which found no state duty to protect guards under similar circumstances. The court stated:

> We acknowledged that our holding might appear to provide greater protection for prisoners than for guards, but concluded that the distinction drawn by the Court in *DeShaney* compelled such a result. * * * The affirmative duty to protect prisoners, we observed, arises only because the state has, by an affirmative exercise of power, so

> restrained the prisoner's liberty that he cannot care for himself; prison guards and jailers, on the other hand, are simply employees who are under no compulsion to submit to unsatisfactory working conditions and may quit whenever they please.

Thus, Plaintiffs cannot prove, as a matter of law, that Glen was in a "special relationship" with Harris County because Glen Page was not in a "custodial" or "involuntary confinement" relationship with the County. It is undisputed that Page's participation in the drug deal was voluntary and that he was not under arrest or under compulsion to complete the transaction in any way.

b. *State Created Danger*

As discussed above, in *DeShaney*, the Court limited the applicability of the Due Process Clause to remedy injuries caused by non-state actors. The Court stated generally that, "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors." *DeShaney*, 489 U.S. at 195. However, the Court left open the possibility that there might be "certain limited circumstances" in which the Constitution imposed an affirmative duty of care and protection upon the State to particular individuals.

The Fifth Circuit has addressed on several occasions, what those "limited circumstances" could be. In *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992), the court suggested that a substantive due process violation could occur if a state official caused injury by arbitrarily abusing governmental power. This

has been referred to as a "state-created danger" theory of liability. "When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct whether or not the victim was in formal state custody" *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200 (5th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1361 (1995).

As stated in *Johnson*, the key to the state-created danger cases "lies in the state actors' culpable knowledge and conduct in 'affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.' " *Id.*, at 200, *citing*, *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987). The court concluded:

> Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must be used their authority to create the opportunity that would not have otherwise existed for the third party's crime to occur." *Id.* at 201.

In support of Defendant's Motion for Summary Judgment, Harris County attached the affidavit of Deputy Sheriff Linda Smith. Deputy Smith averred that on January 11, 1993, she and Glen Page went to the apartment of Depriest Earl Moses to conduct a buy-bust operation. Smith stated that Page entered the apartment and was shot. According to Smith, Page's participation in the operation was completely voluntary. She stated, "I did not ask him to go inside the apartment and did not intend that he do so."

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In response, Plaintiffs attached deposition excerpts from the deposition of Linda Smith, Sgt. W. F. Kessler [the officer in charge of the operation], and Deputy Ashabranner [who was in the arrest team]. These depositions flesh out the events of January 11th.

In her deposition, Linda Smith stated that Page was a new confidential informant and had set up several drug deals in the month prior to his death. (L. Smith deposition, p. 28). Under the procedure, Page was to introduce the officer to the dealer, but the actual exchange of money/drugs was to be completed by the officer — Smith in this case. (L. Smith deposition, p. 30). The confidential informant was not to handle the "flash money" and would not testify in court. (L. Smith deposition, pp. 29-30). Neither the confidential informant nor the officer transacting the drug deal were provided any weapon or protective clothing. (L. Smith deposition, p. 41).

On the date of the incident, Page had set up a meeting with Depriest Moses at a hamburger stand for the purpose of buying cocaine. Smith, Page and the arrest team were briefed and prepared to complete the transaction at the hamburger stand. When Moses failed to appear, Page telephoned him and was told to meet Moses at his apartment. (L. Smith deposition, p. 48-49). Smith, not happy with with arrangement, got on the phone and told Moses that they would only do the deal in the parking lot of the apartment. Moses agreed and she hung up. (L. Smith deposition, p. 49). Smith informed the arrest team of the change in plans. (L. Smith deposition, p. 49).

When Smith and Page arrived at the apartment, Page ran up the stairs to Moses' apartment. He returned and told Smith that the "dope was on the table" and reached for the flash money.

(L. Smith deposition, p. 50). According to Smith, she grabbed the money and told him, "You know the money and the dope is never together. (sic) We're not taking the money up there." (L. Smith deposition, p. 50).

Smith and Page decided to return to Moses' apartment in an attempt to talk him into coming down to the parking lot to complete the deal. (L. Smith deposition, p. 50).

As Smith and Page were climbing the stairs to Moses' apartment, a male told them that only one was allowed into the apartment. According to Smith, "Glen just bounced up the stairs and went inside." (L. Smith deposition, p. 50). When Glen failed to come out, the arrest team moved in, climbed the stairs and waited against the wall of the apartment. (L. Smith deposition, p. 51). A male came to the apartment door, looked out, and slammed the door. Three shots were fired inside the apartment. The officers broke into the apartment and found Page had been shot. (L. Smith deposition, p. 51). Smith's account of the incident was consistent with the testimony of Sgt. Kessler (Kessler deposition, pp. 72-79, 115-121) and Deputy Ashabranner (Ashabranner deposition, pp. 62-69).

Under the summary judgment evidence presented in this case, it does not appear that the Plaintiffs can prove that Harris County policy or custom placed Page in a position of danger and deprived Page of the means to extricate himself from the danger. Kessler and Smith testified that Page set the deal up himself. (L. Smith deposition, p. 48; Kessler deposition, p. 98) The officers' testified that Page was told *not* to enter the apartment but he entered it anyway. (L. Smith deposition, pp. 50, 63; Kessler deposition, pp. 75, 76, 77, 78, 81, 114, 115, 117-118, 155; Ashabranner deposition, pp. 67, 68). While all of

the officers agreed that narcotics deals were inherently dangerous, Page's participation was completely voluntary.

It is undisputed that Page could have extricated himself from the deal at any time. Therefore, Plaintiff's argument that Page was under Smith's "control" because Smith was controlling the drug deal is a red herring and factually misleading. Plaintiffs must do more than show an officer's control over Page in order to hold Harris County liable. Plaintiffs must show a direct causal link between the policy in issue and the alleged constitutional deprivation. *Leffall*, 28 F.3d at 525.

Plaintiffs have failed to allege and prove that the policies or customs of Harris County to use confidential informants, the alleged failure to train confidential informants, or the alleged failure to protect confidential informants placed Page in a "state-created danger." Rather, Plaintiffs allege that Page faced increased danger because of the actions of certain deputies in not allowing Page to take the "flash money" into the dealer's apartment.[3] Because it appears to be undisputed that Page was told not to enter the apartment, Plaintiffs' contention of failure to train is not supported by the facts of this case.

Because the County cannot be held liable under a respondeat superior theory, Plaintiffs have failed to allege and prove facts supporting a Section 1983 claim against Harris County based on its customs or policies.

c. *Policies and Procedures*

Plaintiffs contend that the policies and procedures governing

3. While Plaintiffs also claim that Page was not provided with protective gear, there is no evidence that he requested it.

the Harris County Sheriff's Department and the Task Force created a liberty interest which invoked substantive and procedural due process protection. Under this strained theory, Plaintiffs argue that Harris County and the Task Force accepted federal monies and became obligated by state and federal law to abide by federal regulations which inured to the benefit of Page.

Specifically, Plaintiffs claim, without explanation, that the regulations in issue provided for an expectation of a "jail-like residence during an undercover buy operation"[4]. Further, Plaintiffs argue that Task Force guidelines require that the officer insure that an informant conduct himself in a safe manner, and require that an officer's directions and expectations be clearly conveyed to the informant. Plaintiffs cite no case law supporting their theory on how these maxims for handling informants implicate a constitutionally protected liberty interest.

It does not follow because an individual officer violates a federal regulation or a task force guideline, that a governmental entity can be held liable for that violation. *Monell*, 436 U.S. at 694. First, there is nothing to suggest that violation of any regulation or guideline would rise to the level of a constitutional violation. Second, a state employee's violation of a state duty does not, by itself, establish liability under Section 1983. *Doe v. Rains County Indep. Sch. Dist.*, __ F.3d __, 1995 WL 581308, (5th Cir., October 3, 1995). Finally, there is no suggestion that the alleged failure to comply with the cited regulation or guideline rose to the level of a county policy or custom which would impose liability on Harris County.

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4. *See*, BJA Guideline, Para. 14(c) and 15(b), Ex. A to Plaintiff's Response to Defendant's Motion for Summary Judgment.

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d. *Property interest*

Plaintiffs have alleged that Page was deprived of a property interest without due process of law when the County failed to pay him for his participation in the drug deal which resulted in his death and when the County failed to provide "protective services." The factual basis for this claim is two-fold: Page allegedly signed a "cooperating individual agreement" which entitled him to compensation after every successful undercover operation in which he participated and the drug traffickers were apprehended. Plaintiffs also claim that the regulations and guidelines created a property interest in protective services to Page and his family.

In its Motion for Summary Judgment, Harris County denies that it had any agreement with Plaintiff for compensation. The Affidavit of John Coffel states that the Task Force was a multi-jurisdictional, multi-agency project and not a Harris County department. According to Coffel, the Task Force paid confidential informants from its own funds, which came from the State of Texas, in cash.

Plaintiffs do not dispute this information, but argue that the Task Force was aware of Page's right to compensation. This is not sufficient to show a constitutionally protected property interest with Harris County. Not every deprivation of claimed compensation is actionable under Section 1983 and certainly not without a factual basis. Plaintiffs have failed to analyze the nature of the obligation owed to Page by Harris County within a constitutional framework.

Further, it appears that the "cooperating individual

agreement" either cannot be located or was never executed.[5] There is some testimony that an agreement may have existed at some time in the past, but has disappeared over the course of time. Even so, Plaintiffs have failed to produce any evidence of what obligations such a cooperating individual agreement would typically contain.

Plaintiffs claim that Harris County's failure to produce the "cooperating individual agreement" shifts the burden to Harris County prove that the agreement did *not* create a constitutionally protected property and liberty interest. The court does not agree with Plaintiffs' theory on shifting the burden of proof under such circumstances. Because there is no indication that Harris County was a signatory to the agreement or that the agreement was kept in Harris County's custody, there is no need to determine what consequences should flow from the loss of the document, if the document did, in fact, exist.

Without the "cooperating individual agreement," Plaintiffs cannot make a *prima facie* claim of a protected property interest in either compensation or protection.

Similarly, Plaintiffs have failed to show that the federal regulations and task force guidelines created an expectation in either compensation or protection which is protected by the constitution.

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5. In *Bishop v. Wood*, 426 U.S. 341, 344 (1976), the Supreme Court held that a property interest in employment may be created by ordinance or implied contract. Courts are required to look to state law in order to determine whether a property interest exists. *Id.* In this case, Texas law will determine if a property right was created. Plaintiffs have failed to put forward any summary judgment evidence or case law which would support their property interest theory.

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V. *Conclusion*

Based on the foregoing discussion, it is RECOMMENDED that Defendant Harris County's Motion for Summary Judgment be GRANTED.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have ten (10) days from the receipt thereof to file written objections thereto pursuant to General Order 80-5. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings on appeal.

The original of any written objection shall be filed with the United States District Clerk, P. O. Box 61010, Houston, Texas 77208; copies of such objections shall be mailed to opposing counsel and to the chambers of the undersigned, Suite 7019, 515 Rusk Street, Houston, Texas 77208.

Done at Houston, Texas, this 18th day of October, 1995.

s/ Nancy K. Johnson
NANCY K. JOHNSON
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
SEP 2 1997
CLERK

NO. 97-0196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHANDRELLE L. WHITE-PAGE, Individually and as Next Friend of the Minor Children of GLEN PAGE, GLEN PAGE, JR. and MARQUS MIGUEL GLENZELL PAGE, and PERCY PAGE, Individually and as Representative of Estate of GLEN PAGE, Deceased, and LAVERNE CHERRY, Individually and as Representative of the Estate of GLEN PAGE, Deceased,
Petitioner,

v.

HARRIS COUNTY, TEXAS and THE HARRIS COUNTY ORGANIZED CRIME AND NARCOTICS TASK FORCE,
Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL P. FLEMING
COUNTY ATTORNEY
HARRIS COUNTY, TEXAS

BRUCE S. POWERS
Counsel for Respondent
Harris County, Texas
1001 Preston, Suite 634
Houston, Texas 77002
(713) 755-8359
(713) 755-8924 Fax

A Law Brief Co. • 6605 McGrew • Houston, Texas 77087 • (713) 981-9000

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STATEMENT OF THE CASE

Petitioners brought this suit pursuant to the provisions of 42 U.S.C. § 1983 and the Texas Tort Claims Act. The Petitioners alleged that their decedent, Glen Page, was shot and killed while working as a confidential informant for Harris County and the Harris County Organized Crime and Narcotics Task Force. The Petitioners contended that Glen Page occupied a "special relationship" with Harris County requiring the County to exercise a high degree of care for his safety and to protect him from injury. Petitioners further alleged that Harris County failed to exercise ordinary care in various respects and had policies regarding the use of confidential informants which demonstrated deliberate indifference to the informants' constitutional rights. Harris County moved for summary judgment, contending that it was entitled to judgment as a matter of law. Petitioners filed a lengthy response in which they asserted, *inter alia*, that Glen Page had a contractual employment relationship with Harris County. Harris County filed a reply brief in which it responded to the Petitioners' new theories of recovery and presented summary judgment evidence in opposition to such theories. Thereafter, the Petitioners were granted leave to file their Third Amended Complaint which included a claim for breach of contract.

The summary judgment evidence showed that in the fall of 1992, Glen Page called the office of the Harris County Organized Crime and Narcotics Task Force to volunteer his services as a paid informant. Prior to the incident in question, Page provided information and assistance in six narcotics cases for which he was paid a total of $3,000.00 by the Task Force. On January 11, 1993, Page accompanied an undercover officer to an apartment located at 7810 Peachtree, Houston, Texas to conduct a "buy-bust" operation. Page entered the apartment and was shot by one of the suspected drug dealers. Page's participation in narcotics undercover operations as a confidential informant was purely voluntary. He was free to cease participation in such activity whenever he wished. *R-Vol. 4, pages 129-130.* The summary judgment evidence further showed that the Harris County Organized Crime and Narcotics Task Force is a multi-jurisdictional, multi-agency project. It is not a Harris County Department. The Task Force is manned by law enforcement officers from a number of different cities and federal agencies as well as Harris County officers. The primary source of funding for the Task Force operations is a grant from the State of Texas which is administered by the City of Baytown. Payments to confidential informants are made by the Task Force and not

by Harris County or any of the participating cities and agencies.[1] *R-Vol. 4, pages 127-128.*

The magistrate judge recommended that Harris County's Motion for Summary Judgment be granted. The district court reviewed the

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[1] Harris County challenges and disputes a number of assertions of fact in the Petition. Harris County submits that the following assertions are not supported by any summary judgment evidence or are based upon mischaracterizations of testimony, speculation or hearsay:

"Page was serving as a C. I. for Harris County" (Petition, p. 3 - 4).

"Harris County and the Task Force recruited Page to help them conduct buy-bust sting operations" (Petition, p. 4).

"Linda Smith _ recruited Page as a C. I." (Petition, p. 4).

"She made _ payments pursuant to a written 'Cooperating Individual Agreement' (the 'C. I. contract')" (Petition, p. 4).

"Harris County _ planned the January 11, 1993 buy-bust" (Petition, p. 5).

"Harris County and the Task Force sent Page into the drug-dealer's crack den" (Petition, p. 5).

"Deputy Smith sent C. I. Page into the suspect's apartment" (Petition, p. 5).

"Analytically, there can be no Task Force policy or custom that exists independent of Respondent Harris County; the policies of the Task Force ***are*** the policies of Harris County" (Petition, p. 14).

"Sending Page into the suspect's apartment was in accord with Harris County's _ customs and policies" (Petition. p. 18).

"Harris County's and the Task Force's decision to twice send Page into a drug-dealer's cocaine den proximately caused his death" (Petition, p. 28).

"Respondents admitted that they deliberately sent Page back into the crack house a second time, _ Informant Page was *obeying orders* from his case officer when he re-entered the fortified apartment" (Petition, p. 28).

magistrate judge's recommendations as well as the Petitioners' objections, and concluded that the magistrate judge's recommendations should be adopted by the court. The Fifth Circuit issued an unpublished *per curiam* opinion affirming the decision of the district court. Regarding the issue of notice to the non-movant of the grounds upon which summary judgment might be granted, the Fifth Circuit stated that "not only did the non-movants have notice, they provided it by writing in depth on an issue that was not even raised in the opposing party's original motion". Further, the Court held that any error in granting the motion with respect to the contract issue was harmless because "Plaintiffs do not claim they have any additional evidence to present and the evidence they have presented does not reflect the existence of a contract". The Fifth Circuit found the "state-created danger" theory inapplicable to the case because "at no time was Page under the 'control' of any Harris County employee in creating the opportunity to complete the transaction". In addition, the Court held that "Plaintiffs have failed to prove that any policy of Harris County, whether written or otherwise, placed Page in a state-created danger".

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court. No direct conflict between the circuits is presented and the issues raised by the Petitioners are not of national importance. Morever, no error in the court below has been shown.

A. *The Breach of Contract Claim*.

The Petitioners contend that the Fifth Circuit erroneously affirmed a *sua sponte* summary judgment on their claim for breach of contract. In that regard the Petitioners assert that they did not receive adequate notice of the district court's intention to dispose of the breach of contract claim. The record reflects that Harris County filed its motion for summary judgment on April 28, 1995. *R-Vol. 4, pages 127-136*. As of that time the Petitioners had filed their First Amended Complaint which did not contain a breach of contract claim or any § 1983 theories other than the special relationship theory. *R-Vol. 4, pages 48-60*. When the Petitioners filed their Second Amended Complaint on May 10, 1995, they made no change in their theories of recovery. *R-Vol. 4, pages 180-192*. Additional theories of recovery appeared for the first time in the Plaintiffs' Response to Harris County's Motion for Summary Judgment. *R-Vol. 3, pages 300-521*. Although "breach of contract" was not expressly included in the

Petitioners' response, the Petitioners did contend that their decedent had a "contractual employment relationship" with Harris County. *R-Vol. 3, page 497.* A breach of contract claim was included when the Petitioners filed their Third Amended Complaint on July 19, 1995. *R-Vol. 2, pages 536-553.* On July 21, 1995, Harris County filed its Reply to Plaintiffs' Response to Motion for Summary Judgment. *R-Vol. 2, pages 554-576.* In that reply brief Harris County contended that there is no evidence whatsoever to support the contention that Glen Page had a contractual employment relationship with Harris County. Harris County noted that the deposition testimony cited by the Petitioners in support of their contention makes reference to only the Task Force, not Harris County. *R-Vol. 2, page 573.* In doing so, Harris County pointed out to the district court that there is an absence of evidence of a contract to support the Petitioners' case. This shifted the burden to the Petitioners to establish the existence of a genuine issue for trial. ***Celotex Corp v. Catrett***, 477 U.S. 317 (1986). When the Petitioners filed their objections to the magistrate judge's memorandum and recommendation, they contended that they had "offered considerable summary judgment proof of the existence of an oral and written contract between Defendant Harris County, the Task Force and the decedent Glen Page". *R-Vol. 1, page 848.* The Petitioners argued this same point again in their First Supplemental Objections to Magistrate Judge's Memorandum and Recommendation and Order of Clarification. *R-Vol. 1, page 875.* After the district court adopted the magistrate judge's recommendations, the Plaintiffs filed a Motion for Reconsideration in which they again contended that they had offered considerable summary judgment proof of the existence of a contract between Glen Page and Harris County. *R-Vol. 1, page 888.* The final judgment in this case was not entered until July 2, 1996. *R-Vol. 1, pages 902-903.* The existence *vel non* of a contract between Glen Page and Harris County had clearly been in issue for almost a year before the final judgment was entered. The Petitioners had ample opportunity to bring forward all of the summary judgment evidence they had, prior to the entry of final judgment.

The parties thoroughly briefed and argued the issue of the contract's existence. Consequently, it cannot be said that the district court disposed of the breach of contract claim *sua sponte*. Compare ***Texas Commerce Bank v. Capital Bancshares, Inc.***, 907 F.2d 1571 (5th Cir. 1990). In any event, the harmless error doctrine applied because the Petitioners did not claim that they had any additional evidence to present and the evidence which they presented to the Fifth Circuit did not reflect

the existence of a genuine issue of material fact. ***Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit***, 28 F.3d 1388 (5th Cir. 1994). 28 U.S.C. § 2111 requires that "on the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties". Under Texas law "when a cause of action is based on breach of contract, the plaintiff must show that a contract existed between the parties, that the contract created duties, that the defendant breached a duty under the contract, and that the plaintiff sustained damages as a result." ***Snyder v. Eanes Independent School Dist.***, 860 S.W.2d 692, 695 (Tex. App. - Austin 1993, writ denied). See also ***Ryan v. Superior Oil Co.***, 813 S.W.2d 594 (Tex. App. - Houston [14th Dist.] 1991, writ denied). The Petitioners had no evidence whatsoever that Glen Page entered into a contract with Harris County. Moreover, the Petitioners had no evidence that any agreement which Glen Page may have entered into with the Task Force gave him any right to compensation from Harris County. Further, there was no evidence that Glen Page was ever paid by Harris County for information or services. Thus, the Fifth Circuit correctly concluded that the harmless error doctrine applied in this case.

B. *The State-Created Danger Theory.*

Initially, the Petitioners asserted only the "special relationship" theory as a basis for the alleged violation of a constitutional right. However, this Court's decision in ***DeShaney v. Winnebago County Department of Social Services***, 489 U.S. 189 (1989), negated this theory of recovery since Glen Page was not in state custody when he was injured. As this Court said in ***DeShaney,*** "the affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." 489 U.S. at 200. Some courts of appeals have recognized the "state-created danger" theory as a basis for establishing a constitutional claim despite the absence of a special relationship. Although it can be argued that this theory threatens to transform the Constitution into a tort claims act and should not be adopted in any case, it certainly should not be applied in a case such as the instant case. Glen Page voluntarily became a confidential informant for the Task Force. Regardless of the degree of risk he confronted in working as an informant, no state actor coerced or forced him to do anything. If

private citizens who voluntarily act as informants have a "constitutional" right to protection, law enforcement officers and other government employees who regularly confront dangerous situations as a part of their work must necessarily have the same right. However, this Court's decision in ***Collins v. City of Harker Heights, Texas***, 503 U.S. 115 (1992) makes clear that the Due Process Clause does not provide any such right to government employees who voluntarily accept offers of employment. The Court held that neither the text nor the history of the Due Process Clause supported the plaintiff's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause. Quoting from the Court's opinion in ***DeShaney***, the Court stated the following:

> The Clause is phrased as a limitation on a State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law', but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

503 U.S. at 126-127. Pointing out the custodial nature of the circumstances in prior cases, the Court said the plaintiff could not maintain "that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment". 503 U.S. at 128. Likewise, if Glen Page had any relationship with Harris County (which Harris County denies), it was a relationship into which Page voluntarily entered and therefore no deprivation of liberty can be claimed.

Harris County submits that even courts of appeals who allegedly recognize the state created danger theory would not apply it in this case. The Tenth Circuit would conclude that the facts of this case do not " 'shock the conscience' so as to rise to the level of a substantive due process violation". ***Uhlrig v. Harder***, 64 F.3d 567, 573 (10th Cir. 1995). The Eleventh Circuit would decline to apply the theory on the ground that "the key concept is the exercise of coercion, dominion, or restraint by the state". ***Wideman v. Shallowford Community Hosp., Inc.***, 826 F.2d 1030,1035 (11th Cir. 1987). The Sixth Circuit would say that "it was not the defendants who took [Glen Page] captive and [shot him]; it was [the

drug dealer]. [The drug dealer] was not acting under color of any state 'statute, ordinance, regulation, custom or usage'_ and the outrage suffered by [Glen Page] is simply not compensable in a federal civil rights action". ***Nobles v. Brown***, 985 F.2d 235,238 (6th Cir. 1992). The Seventh Circuit would find the theory inapplicable because no "press gang" had picked Glen Page from the streets and forced him to be an informant. He enlisted, on terms he found satisfactory, and he was free to quit whenever he pleased. The Court would respond to the Petitioners' reliance upon its opinion in ***Bowers v. DeVito***, 686 F.2d 616 (7th Cir. 1982) by saying again that "the state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten". ***Walker v. Rowe***, 791 F.2d 507,511 (7th Cir. 1986). It is only when the plaintiff's involvement with the state is involuntary that the state created danger theory has or should have any application.[2] To hold otherwise is to blur the "significant distinction between a tort and a *constitutional* wrong". ***de Jesus Benavides v. Santos***, 883 F.2d 385 (5th Cir. 1989) (prison guards attacked by inmates have no § 1983 cause of action).

Regardless of the viability of the state-created danger theory, there was no evidence to establish any liability against Harris County in this case. A municipality or political subdivision may not be held vicariously liable for an injury inflicted solely by its employees or agents. It is only when the execution of a government's policy inflicts the injury that the government is responsible under § 1983. ***Monell v. Department of Social Services***, 436 U.S. 658 (1978). The Petitioners failed to offer any summary judgment evidence of a county policy which reflected deliberate indifference toward the safety of Glen Page and which was the moving force causing a constitutional violation. Although the Petitioners claim that the record contains evidence regarding Harris County policy, the deposition testimony relied upon by the Petitioners as summary judgment evidence pertained to the Task Force. Further, it does not establish a "constitutional" violation. In that regard, the evidence offered by the Petitioners did not reflect the existence of policies which could be characterized as arbitrary, or conscience-shocking, in a constitutional sense. All of the matters asserted by the Petitioners are analogous to typical state law tort claims. Consequently, they cannot be asserted under the Due

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2 See for example the factual circumstances involved in ***Wood v. Ostrander***, 879 F.2d 583 (9th Cir. 1989) (police officer arrested driver of car and deserted passenger in high crime area in middle of night).

Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. ***Collins v. City of Harker Heights, Texas*** *supra.*

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL P. FLEMING
COUNTY ATTORNEY
HARRIS COUNTY, TEXAS

BRUCE S. POWERS
Counsel for Respondent
Harris County, Texas
1001 Preston, Suite 634
Houston, Texas 77002
713/755-8359
713/755-8924 Fax